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First Session—Twenty-eighth Parliament

1968-69

THE SENATE OF CANADA

PROCEEDINGS

OF THE

SENATE COMMITTEE

ON

Legal and Constitutional Affairs

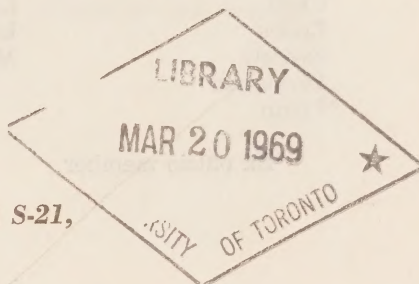
The Honourable A. W. ROEBUCK, *Chairman*

No. 1

First Proceedings on Bill S-21,

intituled:

"An Act to amend the Criminal Code".



THURSDAY, FEBRUARY 13th, 1969

WITNESS:

Department of Justice: J. A. Scollin, Director, Criminal Law Section.

THE SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, Chairman

The Honourable Senators

Argue	Giguère	*Martin
Aseltine	Gouin	McElman
Belisle	Grosart	Méthot
Choquette	Haig	Phillips (<i>Rigaud</i>)
Connolly (<i>Ottawa</i> <i>West</i>)	Hayden	Prowse
Cook	Hollett	Roebuck
Croll	Lamontagne	Thompson
Eudes	Lang	Urquhart
Everett	Langlois	Walker
Fergusson	MacDonald (<i>Cape</i> <i>Breton</i>)	White
*Flynn		Willis

(Quorum 7)

*Ex officio member

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday,
January 22nd, 1969:

"The Order of the Day being read,
With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion
of the Honourable Senator Roebuck, seconded by the Honourable Senator
Croll, for the second reading of the Bill S-21, intituled: "An Act to
amend the Criminal Code".

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable
Senator Fergusson, that the Bill be referred to the Standing Senate
Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative."

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

THURSDAY, February 13th, 1969.

Pursuant to notice, the Senate Committee on Legal and Constitutional Affairs met this day at 10:00 a.m.

Present: The Honourable Senators Roebuck (*Chairman*), Aseltine, Choquette, Cook, Croll, Eudes, Flynn, Hollett, Lang, Langlois, MacDonald, (*Cape Breton*), Prowse, Walker and Willis—(14).

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel; John A. Hinds, Assistant Chief, Committees' Branch.

Following discussion, it was agreed that the Honourable Senator Phillips (*Rigaud*) be appointed deputy chairman; the Honourable Senator Urquhart be appointed committee whip.

After discussion, it was agreed that the following senators comprise a Steering Committee: Roebuck (*chairman*), Choquette, Haig, Phillips, Prowse and Urquhart.

Upon motion it was *Resolved* to print 800 copies in English and 300 copies in French of the proceedings of the Committee on Bill S-21.

Bill S-21, "An Act to amend the Criminal Code", was read and considered and the following witness was heard:

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice.

At 12:30 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

L. J. M. Boudreault,
Clerk of the Committee.

THE SENATE

COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Thursday, February 13, 1969.

The Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code, met this day at 10.00 a.m. to give consideration to the bill.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The committee agreed that a verbatim report be made of the committee's proceedings on the bill.

The committee agreed to report recommending authority be granted for the printing of 800 copies in English and 300 copies in French of the committee's proceedings on the bill.

The Chairman: Honourable senators, my first comment is to welcome you to this committee. It is going to be an important one, and there is going to be a good deal of labour connected with it, not a little study, and much to learn—and perhaps the one who will have the most to learn is your chairman. However, I am sure it is going to be an interesting committee.

I would like to say something about the constitution of the committee. I read from the *Minutes of Proceedings* of the Senate of November 19, 1968, being the Third Report of the Special Committee of the Senate on the Rules of the Senate, as follows:

Your committee recommends that the Standing Rules and Orders of the Senate of Canada be amended as follows:

1. Standing Rules 78 to 82, both inclusive, are repealed and the following substituted therefor:

"78 (1) The Standing Committees shall be as follows:...

And then:

"9. The Senate Committee on Legal and Constitutional Affairs, composed of thirty members, seven of whom shall constitute

a quorum, to which shall be referred on motion all bills, messages, petitions, inquiries, papers, and other matters relating to legal and constitutional matters generally, including:

(i) Federal-Provincial relations.

(ii) Administration of Justice, Law Reform, and all matters related thereto.

(iii) The Judiciary.

(iv) All essentially juridical matters.

(v) Private bills not otherwise specifically assigned to another committee, including marriage and divorce."

That is our constitution, really, but there are these items as well that are of interest to us:

"78A. The senators occupying the recognized positions of Leader of the Government and Leader of the Opposition in the Senate shall be *ex officio* members of all Standing Committees of the Senate...

80. Senators, though not members of a Committee, may attend and participate in its deliberations but shall not vote.

81. Members of the public may attend any meeting of a Committee of the Senate, unless the Committee otherwise orders."

I would like to put on record the names of the members of this committee as it is now constituted. They are: Senators Argue, Aseltine, Bélisle, Choquette, Connolly (Ottawa West), Cook, Croll, Eudes, Everett, Fergusson, Flynn, Giguère, Gouin, Grosart, Haig, Hayden, Hollett, Lamontagne, Lang, Langlois, Macdonald, Martin, McElman, Méthot, Phillips (Rigaud), Prowse, myself, Roebuck, Thompson, Urquhart, Walker, White and Willis.

I should report, I think, that there was a general meeting of the Committee of Selection—perhaps you were all present at it—at

which I had the honour of being elected chairman of this committee. That is why I am in this seat this morning.

Yesterday we had a meeting of the various chairman of all committees to arrange the times of our meetings. I asked to have this committee meet on Thursday, but was not successful in that. The Whip, Senator McDonald, had filled up Thursday. I did not want to meet on Wednesday because many of us attend caucus, and I did not want our meeting broken up. It was suggested that we might meet at 9 or 9.30 and sit until 11, and then adjourn to meet again at 2 o'clock, but I did not like that idea a little bit. So, the next best, and perhaps it is a good best, is Tuesday afternoon.

Senator Croll's Committee on Poverty will meet on Tuesday morning, and Senator Aird's Committee on Foreign Affairs will also meet on Tuesday morning, so that if we meet at 2 o'clock on Tuesdays I would fancy that we could get a quorum all right. We have such a welter of committees and they are so active that senators must not think they can take it as easily as they have in the past. We are going to have more meetings on Tuesday than we have ever had before. We shall try to not have the Senate meet on Tuesday afternoon, but rather on Tuesday evening, which will leave the afternoon to us.

I hope that that is satisfactory to all members of the committee present. It was the best I could do. I certainly do not want to have a broken committee meeting on Wednesday.

I should say something about personnel. We are very pleased to have with us Mr. E. Russell Hopkins, the Law Clerk and Parliamentary Counsel of the Senate. He may not always be able to be with us, but I know he will be here when he can. Senators no doubt will be pleased to know that while we have Mr. John Hinds with us this morning we have also Mr. Marcel Boudreault, who is very experienced in the work that we will have for him to do. He should be with us right through to the end of the session.

I should like to say something about Mr. Boudreault's experience. He was a court reporter in the army during the 1940's. He was a reporter—bilingual by the way—for the former Board of Transport Commissioners for a number of years, and for the last three years he has been a very valuable member of

our divorce staff. He has been with the commissioner and has carried quite a load there, but that load is diminishing very rapidly, so it is my hope that we shall have him here at all times serving this committee.

We have with us this morning Mr. J. A. Scollin, Director of the Criminal Law Section, Department of Justice. I will have more to say about this later on.

There are some things we should take care of. We have to decide whether we should have a steering committee, and I should like to say something about that. The Whip informed me that it was one of the obligations, shall I say, or functions of the chairman to select if he wished to do so a deputy chairman or vice-chairman. I certainly desire that. I cannot remember when I last lost a day from work until three weeks ago when I was hit by a cold which kept me confined to my own chamber for two solid weeks. I thought it was a good idea to have a deputy chairman. I would like very much to recognize Senator Lazarus Phillips, so I asked him if he would act in the capacity of deputy chairman. I think it delighted him that I had done so. He is a very distinguished solicitor and counsel of Montreal, and a very fine gentleman, whom I have know for many years.

At the meeting to which I referred a moment ago a whip was elected—not by us, but by them, and that is perfectly satisfactory so far as I am concerned—for each of the other committees. For this committee Senator Urquhart was elected to the not particularly attractive job of whip. He accepted it, and I hope that that is satisfactory to all of us. It will be his job to take care of the attendance and, of course, some other things besides. That makes three liberal members of the committee and I did not think they would constitute a proper steering committee, so I took the liberty of asking Senator Haig if he, as a Conservative, would be a member of the steering committee, and he was very pleased to do so.

That makes a steering committee of four members. I do not think it is important that we have an odd number on that kind of a committee, but if the committee feels that there should be five members then, of course, the meeting is open to a nomination. If that is satisfactory, would you approve a steering committee composed of the four senators I have mentioned, namely, myself, and Senators Phillips (Rigaud), Urquhart, and Haig.

Hon. Senators: Agreed.

The Chairman: Very well. I should like to refer to the steering committee the question of whether we need legal counsel, and the matter of necessary staff.

Senator Croll: But, we have a legal counsel.

The Chairman: But he is not going to be here all the time.

Senator Croll: He will be here often enough. We cannot improve on him.

The Chairman: Do I get the suggestion from the floor that we do not need a legal counsel?

Senator Flynn: That is right, we do not need one.

The Chairman: I am glad to have that guidance. As a matter of fact, I agree with it. Then we have an order passed by the house referring a special bill, Bill S-21, in connection with hate propaganda and other matters to this committee. I will come to that a little later on.

I want to say something about the history of the present bill that is before us and to give the references to where what I am going to say can be found, because this is the opening sitting and I should like to have some of these routine matters covered in the record.

Bill S-49 has been referred to us.

Senator Aseltine: Was there a motion to refer this bill to this new committee?

The Chairman: Yes, to this committee.

Senator Aseltine: When was that?

The Chairman: I can tell you that in a few minutes. I will come to it if you will let me.

Its first predecessor was Bill S-49, an act to amend the Criminal Code (Hate Propaganda). It was presented and read a first time by Senator John J. Connolly. That will be found in *Hansard* of November 7, 1966, at page 1077. I sponsored the bill on November 9, 1966 (*Hansard*, page 1109). It was followed by 18 speeches by senators. It was the most thoroughly discussed measure, I think, that has come before us for quite a while.

The Parliament prorogued on May 8, 1967 (*Hansard*, page 1925), and it opened on the same day, the second session of the 27th Parliament. Then, since the former measure died

on the Order Paper, Bill S-5 was introduced by Senator Deschatelets on May 9, 1967 (*Hansard*, page 14).

On June 29, 1967 (*Hansard*, page 248) Senator John J. Connolly moved:

That a Special Joint Committee of the Senate and House of Commons be appointed to study and report upon amendments to the Criminal Code relating to the dissemination of varieties of "hate propaganda" in Canada as set out in Bill S-5, intitled: "An Act amend the Criminal Code".

On July 7, 1967, Parliament adjourned and resumed on October 31, 1967. On November 2, 1967, Senator John J. Connolly moved:

That the order of the Senate of 29th June, 1967, for the appointment of a Special Joint Committee of the Senate and House of Commons to study and report upon amendments to the Criminal Code relating to the dissemination of varieties of "hate propaganda" in Canada as set out in Bill S-5 intitled: "An Act to amend the Criminal Code", be rescinded.

That will be found in the *Journals of the Senate* 1967-68, at page 280. That joint committee had held only one meeting, at which Senator Bourque was elected the Senate chairman. I do not think it met again. I am sure I never received any notice of another meeting, and it was rescinded, as I have just noted.

Also on November 2 of that year (*Hansard*, page 358) the Honourable John J. Connolly moved:

That the Special Committee of the Senate be appointed to study and report upon amendments to the Criminal Code relating to the dissemination of varieties of "hate propaganda" in Canada as set forth in Bill S-5.

Senator Prowse became the chairman of that committee and there were three meetings. On November 21, 1967 (*Hansard*, page 450) that bill, S-5 was referred to that joint committee of both houses. The committee met on February 14, 1968, with a witness, Mr. J. A. Scollin, Director of the Criminal Law Section of the Department of Justice. He is here again today to give us a further drilling on this bill. That committee met on February 14. It met again on February 29, at which meeting we had quite a number of distin-

guished witnesses, largely from the Canadian Jewish Congress. I will not enumerate them because they are too many to do so. The third meeting was on March 7, 1968.

Then we had dissolution, so that bill died on the Order Paper, as did that committee. On our resumption of the new Parliament, the current Parliament, the bill was introduced again in almost the same form and is now before us.

That, honourable senators, is the history of the situation up to date. We have had it before us for a long time, and I think the question which will arise out of that statement is whether we adopt the evidence that was given before or whether we hear it again. Mr. Scollin is here, and I would suggest that we certainly hear what he has to say. Then we can take up again, if you like, consideration of what we do next, or perhaps we could refer the whole matter to the steering committee.

Senator Choquette: Did you have letters from rabbis who said they were not favourable to this bill, that they wanted to be heard and wished to know exactly when they could be heard? Was there not a letter from a Rabbi Dworkin?

The Chairman: Yes, Harry Dworkin.

Senator Choquette: Did these people change their minds, or do they still want to come and say what they think about this bill?

The Chairman: The last time I saw Harry Dworkin he had not changed his mind, but he has changed his position to some extent because he is now Vice Dean of the Law School at Osgoode Hall.

Senator Choquette: Then he does not intend to give evidence?

The Chairman: He wants to give evidence as far as I know.

Senator Choquette: That is what I would like to hear.

The Chairman: So would I.

Senator Choquette: So far we have heard from people who wanted this bill passed, but I am anxious to hear from people who do not want this bill passed. We have received a lot of letters from people who implored us, who begged us, not to pass such legislation; we have letters on the files.

The Chairman: Yes.

Senator Choquette: I should like to hear some of these people.

The Chairman: In that case, had we not better go right ahead as though nothing had preceded us?

Senator Choquette: If we are going to hear the people who came to us, there were two groups. One was *bona fide* 100 per cent Jewish whose presentation was well documented.

Any people who would like to be heard are welcome, people such as Maxwell Cohen, the Dean of the Law Faculty of McGill University. He was asked the last time he was here to prepare a brief which he would present the next time he appeared, a brief showing that there was little if anything in the Criminal Code to cope with this situation. He said he would do that.

Senator Prowse: Mr. Chairman, perhaps it should be pointed out that leading up to the bill the federal Government had set up a Special Committee on Hate Propaganda in Canada, under the chairmanship of Dean Cohen. Professor Mark R. MacGuigan, then Associate Professor of Law, University of Toronto, was a member of that committee. That special committee produced a very fine report. Dean Cohen subsequently appeared before our committee and gave evidence, which is in our records. Our committee planned to recall people like Mr. Scollin and Dean Cohen. There was also the testimony of a psychiatrist whose contribution was important.

We received a great deal of correspondence, not just from rabbis but from various religious groups. Some of them merely indicated a concern that this bill would prevent them from preaching the word of God as it appears in the Bible. There were many such letters.

Senator Choquette: There were many people who wanted to be heard. The files are full of names.

The Chairman: Have you those files?

Senator Prowse: They were in the hands of the Clerk of the Committee, Mr. Jackson, and I presume that Mr. Hinds has them now. Some wanted to make representations in favour of the bill, while others wanted to oppose it.

There is another group in Montreal which, as far as I have been able to ascertain, is a *bona fide* labour group made up largely of new immigrants to this country from central Europe. They are very concerned, and I gather they are in favour of this type of legislation. There is a great deal of interest on both sides.

Senator Choquette: Yes. A lot of people feel we are going to be placed in a strait jacket and they do not want that. They say, "Let's keep the only thing we have left, which is liberty of speech." They are right; I feel that way too.

Senator Prowse: Mr. Chairman, there are a great number of letters on file which I think the steering committee should examine, because we had indicated to these people we would give them an opportunity to be heard but because of prorogation of Parliament and the ensuing election it became impossible for us to accommodate them. Our correspondence with them indicating that they would be given a change to be heard probably is not binding on the present committee, but I think we do have a moral obligation here.

Senator Choquette: Mr. Chairman, what is your plan? As I understand it we can take the attitude that we are not going to re-hear representations that have already been made.

The Chairman: Well, with regard to having heard them and not hearing them again, only one-third of this present committee sat on the previous committee. Two-thirds of this committee did not hear any of these witnesses. I am in the hands of the committee in this regard. I would suggest that we hear Mr. Scollin by all means, because he is an official of the department and is here to open the discussion. I think we might hear a witness from the Canadian Jewish Congress.

Senator Lang: Mr. Chairman, I know I can say this, that the Minister of Justice gave an assurance to the Canadian Jewish Congress that they would not have to appear again in connection with this bill. I think assurance was probably made without deep consideration as to the constitution of our committee, but I thought the steering committee itself should know that fact, as it may affect the way you address yourself by correspondence to the Canadian Jewish Congress, and ask them if they wish to appear again.

The Chairman: It would be in that form, of course.

Senator Lang: Secondly, I would like to say that the United Church of Canada wishes to make representations in connection with this bill. I do not know whether their intention to do so is in the correspondence or amongst the records of Senator Prowse's committee. I would want the steering committee and you, Mr. Chairman, to invite them, in any event, to make representations if their intention is the same now as it was before.

The Chairman: I agree. We would have to go further if we invited the United Church. We would have to give the same opportunity to the Catholics, the Anglicans and others.

Senator Prowse: This might not apply to the people you want to call, but I believe every group that wants to make representations should be required to submit briefs, in a suitable number of copies, in advance. Had we taken that precaution originally we would have avoided one embarrassing situation that occurred where we wasted the time of the committee for an entire day.

The Chairman: We did that in the Divorce hearings; they all had to present briefs.

Senator Prowse: The groups which were in touch with me practically unanimously were quite happy at the suggestion that they would be permitted to submit their briefs in advance.

The Chairman: Very well.

Senator Prowse: That is, the *bona fide* ones.

Senator Croll: Mr. Chairman, should not everyone be heard who wants to be heard?

The Chairman: Yes, with such exceptions as this. We had a woman who wanted to come before us to tell us what a heel of a husband she had. She insisted on coming, and she was going to take the hide off that lawyer of his.

Senator Croll: She must have thought you were sitting on Divorce.

The Chairman: There have been several like that.

Senator Croll: If anyone wants to be heard, let us add them to the list that we already have.

The Chairman: That is a pretty good general proposition.

Senator Prowse: Mr. Chairman, may I say this to that general proposition: one group came in with voluminous documents to prove something, I presume, but they had absolutely nothing to do with the bill, and in our questioning we could not tie them down. All they were doing was using this committee as a forum for their own particular kind of hate.

With that reservation, I would say that Senator Croll is completely correct, but by asking them to submit their briefs in advance we can find out what they want to say and whether it is going to contribute to our understanding of this bill, or whether we are merely being victimized or used by somebody for some particular purpose.

The Chairman: Senator Prowse, I was there, and I heard that same waste of time on our part, and I can assure you that as far as I am concerned they will not come before us again. They were a fraud to start with, in calling themselves the Conservative Party.

Senator Prowse: There may be others like that, but if we have briefs in advance, your steering committee can decide whether it is relevant and whether or not you want to permit them to come.

Senator Choquette: The "Conservative Party" sounded so good!

Senator Croll: Mr. Chairman, in view of the experience that Senator Prowse has had, which is most valuable, why not add him to your steering committee?

The Chairman: That has been running through my mind while he has been speaking. Would you join the Steering Committee, Senator Prowse?

Senator Prowse: Yes, Mr. Chairman, it would be my pleasure.

Senator Flynn: And Senator Choquette too, for that matter.

The Chairman: We do not want too big a steering committee. With Senator Prowse we have five. Is that not enough?

Senator Walker: And Senator Choquette—an extremely able man.

Senator Choquette: I have no objection.

The Chairman: All right.

Senator Flynn: The steering committee could go over the evidence taken by previous committees and see what is relevant, and then draw the attention of this committee to whatever is relevant at this time.

I do not know, and I did not follow the previous committee very closely, but I wonder if there was any evidence on facts or whether the discussion was only on principle, or if facts were brought before the committee to support the necessity for this legislation.

I have been trying to find out facts that really suggest that we need this legislation, and I have not been able to discover any. I was wondering whether the committee had such evidence.

Senator Prowse: I believe there is in the committee records at the present time a number of copies of documents. We should also have available to us copies of Dean Cohen's initial report.

Senator Croll: Everybody has a copy of that.

Senator Flynn: I have seen it. It is very theoretical; it is not based on facts.

The Chairman: We hope to have copies of it.

Senator Croll: The man who perhaps suffered more from this than anyone else during the last year was the present Prime Minister, and I think he has quite a dossier of facts as to the sort of hate literature that was used against him in the course of his campaign to become leader of the party. There are facts galore there, and I have some of them.

Senator Prowse: There is some correspondence on that.

Senator Flynn: I do not think you would call him "the people" or "a group".

The Chairman: We will have a lot of facts. As a matter of fact, Mr. Scollin has some facts to lay before us, new ones as well as some fine older facts, but some are quite modern. One of the speakers in the conference just closed made a reference to distribution of hate propaganda. I do not remember who it was, but my secretary is going through the records now trying to find that reference. The speaker said that there was hate propaganda distributed to those participating.

Senator Cook: That was Premier Robichaud of New Brunswick.

The Chairman: She is going to give me what he said. He said that they had some hate propaganda distributed to them in the

hotels here in Ottawa, and Mr. Scollin is going to tell us about something else, which I need not forecast now. We will have lots of facts before we are through.

Is there anything else we should consider? We know the dates for our meetings. We know when we can meet and when we cannot.

You are going to leave it to the Steering Committee to decide who will be witnesses, and we will have a program arranged, perhaps for next week, although I understand there is an adjournment coming up, but we will consider all that.

At the present moment we have what we opened with last time, an address by Mr. Scollin and, if there is nothing more the committee wishes to bring up, I shall call upon him.

Senator Eudes: Mr. Chairman, before we proceed further, I was just reading the bill and the French translation does not give the exact meaning of the English text. Take, for instance, section 267A(2)(d), which in the English version reads:

deliberately imposing measures intended to prevent births within the group;

In French it is:

le fait d'imposer délibérément des mesures destinées à prévenir les naissances au sein du groupe;

The word "prévenir" is not the correct word; it does not give the idea the English text does. "Prevent" has the meaning of...

Senator Choquette: "Impeach".

Senator Flynn: It is "empêcher".

Senator Eudes: Then in paragraph (b) you have "causing serious" and in French you have "graves" instead of "serious". It has not the same meaning. Then, in English, there is the word "indictable," and in the French text it is translated by the word "criminel," which does not have the same meaning at all. This goes on all through the bill.

Senator Flynn: Could we not have this matter referred to the Department of Justice, and have someone there go through the bill and check it?

Senator Eudes: If you went to the courts with this French text another lawyer would bring in the English text and argue that what you say is wrong.

The Chairman: We are fortunate in having Mr. Scollin right here with us. He is head of the particular branch, and no doubt...

Mr. E. Russell Hopkins (Law Clerk and Parliamentary Counsel): Mr. Chairman, my understanding of the new procedure with respect to the bilingual form of bills is that either the English or the French text is amendable in committee. My suggestion would be, if it is agreeable to Mr. Scollin, and since questions have been raised as to the validity of the French translation...

Senator Eudes: So, we are to be the translators?

Mr. Hopkins: I suggest that Mr. Scollin invites his bilingual associates to discuss with the translation branch what Senator Eudes has said, and return to the committee prepared to discuss suitable amendments to the French version of the bill after we have completed...

Senator Choquette: That is not necessary if it is self-evident. Are you bilingual, Mr. Scollin?

Mr. Scollin: No, I am not. I do not think I am even unilingual.

Senator Choquette: Do you not agree that that is a false translation?

Mr. Scollin: "Criminel" is the word that is used as a standard translation of "indictable".

Senator Choquette: This is nonsense. Section 267A(2)(d) is to prevent or stop—just read that.

The Chairman: I think we are indebted to Senator Eudes for having brought up this matter, but we cannot settle it right now. Mr. Hopkins' suggestion is that we bring the persons responsible here, and perhaps they can have an interview with Mr. Scollin before they come. Mr. Scollin will look after that for us.

Is there anything else that should be brought up before we hear Mr. Scollin's presentation? If not, I will ask Mr. Scollin to address us. I remind senators that Mr. Scollin was here on a previous occasion, but certainly at that time not all of us were present. I would like him to disregard what he said previously, and give us an analysis of this bill, his opinions, and so on, in regard to it.

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice: Mr. Chairman and honourable senators, perhaps I should first delimit the area that I think I can cover. I can give you a resumé of the important legal implications of the bill. I can give you some of the background of the bill. I can give you some idea of the related or cognate sections of the Criminal Code and other statutes, and I can give you some indication of the comparable provisions in the United Kingdom. However, on the policy aspects of the bill, as to why a particular provision is either in there or not in there, I am sure you understand why I cannot really be of any assistance to you. This is a Government measure, and I am not in a position to speak on Government policy.

The bill in its main lines derives from a draft amendment to the Criminal Code which was proposed by the Special Committee on Hate Propaganda which was appointed in 1965. In the report of that committee the draft amendments proposed are contained in Chapter VI, at page 68 and 69. As we go along I shall draw to your attention the respects in which Bill S-21 varies from the recommendations of the Special Committee.

Perhaps I should point out that Bill S-21 is in exactly the same form as Bill S-5 of the twenty-seventh Parliament, and with the exception of a very minor amendment is exactly the same as Bill S-49 of the twenty-sixth Parliament. The only difference between Bill S-49 of the twenty-sixth Parliament and its successors is that towards the end of the bill in subsection (8) of section 267C the term "a district magistrate" has been replaced, in respect to the Province of Quebec, by the term "a judge of the provincial court". This is done in order to bring this legislation into line with the change in name made by the Legislature of the Province of Quebec.

Senator Choquette: What about Ontario? Ontario magistrates are now judges too.

Senator Croll: Yes, provincial judges.

Senator Choquette: I was wondering whether a change is required because of that.

Mr. Scollin: I will check that. If that legislation is now in force then a change may be necessary, but I rather doubt that because the jurisdiction is subsection (8) in provinces other than Quebec is given to a judge of the county or district court. It is not given to the

magistrates in those provinces. It is only in the Province of Quebec that the jurisdiction in the *in rem* proceedings is given to a judge of the provincial court, so I think an amendment is not necessary, but I will certainly look into it.

The Chairman: Will you check on that and report back to us?

Mr. Scollin: Yes I will.

The bill is divided into four main areas. The first one deals with the advocating or promoting of genocide; that is the provision in section 267A. The next two areas, which are dealt with in section 267B, are public incitement of hatred and wilful promotion of hatred anywhere, whether in public or not. The fourth area of the bill is section 267C, which deals with what are called *in rem* proceedings; that is proceedings taken in respect of the offending article itself rather than by way of prosecution of the offender. These *in rem* proceedings cover material which offends against either the advocating or promoting of genocide provisions in section 267A, or the wilful promotion provision in section 267B.

Section 267A, the advocating or promoting genocide provision, would introduce a new offence into the criminal law of Canada. Certain substantive offences, such as murder or causing serious bodily harm, conspiracy to commit those offences, procuring the commission of those offences or incitement to commit those offences would be covered under the present Criminal Code. Other matters which are defined as genocide would not be covered. The definition of genocide, which is given in subsection (2) of section 267A, follows the terms of the international convention rather than the recommendation for the definition given in the report of the special committee. You will see that subsection (2) provides:

In this section "genocide" includes any of the following acts...

and then an important provision...

committed with intent to destroy in whole or in part any group of persons:

First of all the definition in an "includes" definition and not a "means" definition. The acts which are classified as genocide are five in number.

Senator Choquette: Section 267(2)(e) refers to:

forcibly transferring children of the group to another group.

They did that to the Doukhobors some time ago; they took the children and put them in another school with another group and tried to integrate them. Would that come within that definition?

Mr. Scollin: There is a very important intent specified in order for any such act to be genocide, and that is the "intent to destroy in whole or in part any group of persons". It does seem to me that what was done in British Columbia was done with a very different intent from that specified in subsection (2).

Senator Choquette: The results were the same. What governs the intent in a case like this?

Mr. Scollin: I would have thought that since the definition specifies the intent as being quite specific there, and since it would seem to me that the motivation of what was done some years ago in British Columbia was to try to create lawabiding citizens from the younger generation of Doukhobors, there was no intent to prevent them from being Doukhobors, no intent to prevent them retaining their connection.

Senator Choquette: Where does it state that intent will be the test?

Senator Langlois: In the opening paragraph?

Mr. Scollin: Subsection (2) in the definition.

Senator Eudes: There is no crime without intent.

Senator Choquette: We know that.

Senator Eudes: It is paragraph (e).

Senator Choquette: That is the one I am now dealing with. I say that they did that to the Doukhobor children in B.C. about six or seven years ago.

Senator Prowse: I would suggest that when you read subsection (2) you have to remember that:

In this section "genocide" includes any of the following acts committed with intent to destroy in whole or in part...

Then you do these things. I would say that the whole basis of the charge would be to prove the intent, and a prosecutor who could not prove that the act was intended to do one of the five things in here for the purpose of destroying the group would fail in his case.

That is perfectly clear. In the situation that is worrying you, the Doukhobor situation, there is a conflicting intent. The intent was to follow the practice generally taken of removing children out of a parental environment where they were apt to become delinquents. I think it was probably done under the Child Welfare Act.

The Chairman: The intent was not to destroy them but rather to save them.

Senator Prowse: That is right, which is an entirely different matter.

Senator Choquette: You can always say your intent was for a different purpose.

Senator Prowse: Intent is a very difficult thing to prove. Even where there is not intent the courts will inquire into it in any criminal action. Where the words "with intent" are used the onus on the prosecutor would be a high one. In other words, an accidental act or a coincidental act would have to be such that you could imply the intent from it.

Senator Eudes: Can you prove the intent?

Senator Prowse: That is a good question.

The Chairman: There is an old saying in English law that a man is presumed to intend the results of his actions. That is if he hits you with an axe the intent was to kill you. In this instance of the Doukhobors it was the intention to make of these children good citizens instead of the really bad ones who were blowing up bridges and things of that kind.

Senator Lang: It was destroying the group of Doukhobors as such.

The Chairman: I do not think it changed their religion in any way.

Senator Lang: It breaks up the group.

The Chairman: After a rather short time in a school, they were returned to their group as better educated children than when they left, but that was all.

Senator Prowse: What happened with the Doukhobors was that the parents were convicted of a series of breaches of the Criminal Code of Canada. They were taken away from the children and the children were cared for by the state until such time as the parents were considered fit to look after their chil-

dren again. This is something which is done under the provincial Child Welfare Act every day.

Senator Cook: I would like to ask the witness, for what part of this can you find no remedy in the Criminal Code? For instance, intent to kill members of the group, intent to cause bodily harm.

Mr. Scollin: It is certainly arguable that to advocate or to promote an unspecific crime, that is we are not inciting anyone to kill or destroy Jones, Smith or Wilson, we are talking about general incitement to destroy or to kill a whole unnamed group of people. I would think that from a point of view of a prosecutor it would be extremely difficult to establish, to the satisfaction of the court, that you had managed to even make out a valid charge.

Senator Prowse: With the present Biafran situation, perhaps this is a good point to make with respect to Nigeria, where the Biafrans are insisting they are going to be the victims of genocide. But investigatory groups sent in under the auspices of the United Nations say that that is not so, although people are being killed.

Senator Cook: That is right. That is in Biafra, but we are talking about Canada. Is there any incident of such a group who are promoting the killing of members of a group except a few crackpots?

Mr. Scollin: I do not think this kind of suggestion can arise from anyone else but a crackpot. I think the legislation is directed, certainly in part, against the insidious results of statements by persons who are unbalanced. I do not think for that reason it is any less justifiable, because much of the code is directed against crackpots. Your average criminal by and large is not just a normal chap. The Criminal Code is enacted against the abnormal and unusual and to some extent the unbalanced. I do not think in essence that is a basic objection to the principle of the bill.

The Chairman: The question is a good one that the senator is asking, that is, we are trying to find out what is in this bill, in this section that is not in the Criminal Code. How does this section carry us further along than the Criminal Code already carries us?

Senator Choquette: It was the most pertinent question I thought at the time when

Dean Cohen was here. He said, "I am glad you asked that, senator, and I am going to prepare a brief and I am going to give it to you the next time I come here." I asked what there was in the bill that was not taken care of by the Criminal Code and he could not answer offhand, but he said, "I will prepare something, and the next time I am invited here I will give that to you."

While the witness is on that point, I thought that genocide—and I pointed it out at that time—was for many reasons the weakest point in this whole bill, but one and the best reason was Senator Hayden's wonderful speech. He said this was so absurd that we should not take it seriously, and we should eliminate the part regarding genocide. He said even in Hitler's time had there been a law such as this one here it would have made no difference. Hitler was a maniac and he would have ignored it. He would not have felt bound by it, and nobody in Canada would feel bound by this. I thought it was a weak point, but in all of the discussions it seems that those who made representations insisted that it was important. I do not see the importance of it.

The Chairman: The question of Hitler being in this country—we would have had him in jail.

Senator Choquette: Yes, I know.

The Chairman: Look, let us be practical in this matter. This is, as you say, a very important part as regards to this section. Now, Mr. Scollin has suggested on a previous occasion that he would write a memorandum on it.

Mr. Scollin: Dean Cohen said he would.

Senator Choquette: Yes.

The Chairman: Let us have from Mr. Scollin a carefully prepared considered opinion. Would you do that?

Mr. Scollin: With respect, Mr. Chairman, I think the position that I tried to make is the beginning and the end of the position and that is that genocide, as defined in there, is not substantively made an offence but the advocacy and the promotion of these acts is made an offence. In my considered view that is not an offence under the present Criminal Code.

Dean Cohen may or may not agree with me; I do not care very much. My statement is in reference to law; in policy it is a different

matter as to whether or not it is worthwhile or ought to be provided for. I cannot speak on that, but in law there is no known offence in Canada of advocating or promoting genocide. My experience in criminal law would tell me that there is no provision to frame a charge that consists of a criminal offence against a person who writes material, that advocates or promotes killing of members of a group or of causing serious bodily injury or mental harm to members of a group or any one of those subparagraphs in subsection 2. My position is that there is no offence just now under the Criminal Code that I, as a prosecutor, could frame a proper valid charge under. In respect to an individual or the identifiable individual there might be incitement or conspiracy and there might be a charge. There is no charge in advocacy or promoting genocide. In law there would be no charge. The function of the committee is to decide. As a policy matter this is something which ought to be or ought not to be. I really cannot say nor can I add much more to what I have said.

Senator Cook: Of course section 153 of the Criminal Code prevents the use of the mails for such purposes does it not?

Mr. Scollin: It does.

Senator Prowse: Is this not also tied in with the International Convention on genocide of which Canada is a signatory?

Mr. Scollin: Yes, Canada is a party to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide which was adopted by the General Assembly of the United Nations on December 9, 1948, which appears on page 289 of the special committee's report.

This Convention, in Article II, defines "genocide," and in Article III resolves:

The following acts shall be punishable:

(a) Genocide; . . .

And Article V of that Convention says:

The Contracting Parties

... which include Canada . . .

undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Senator Lang: What are "the other acts"?

Mr. Scollin: They are: conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide.

Article II defines "genocide" as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Senator Lang: Is "advocating genocide" included? I was wondering whether advocating genocide is included in the convention.

Mr. Scollin: Article III, after dealing with genocide, deals with conspiracy, incitement, attempt, and complicity.

Senator Walker: I suppose that incitement is a definite form of advocacy.

Senator Prowse: The act says "advocates or promotes". This gave some concern last time, as to whether "promotes" was too wide.

Senator Croll: You have to use a pretty strong word.

Senator Walker: I can understand the United Nations having this, because there are many nations in the world, some in the Near East, where they would be very applicable, but it seems to me absurd for this sort of thing in Canada. Before we decide whether we need all this, I want to know whether there are any examples which justify our using a clause like this, because the freedom of speech, expression and action is one of our British heritages, and to get this sort of thing in our Criminal Code is, to me, quite absurd. Why is it being advocated? The fact it is in the United Nations charter does not affect Canada. It should not be in our bill. We have been given no reason yet why it should be.

Senator Cook: With all due respect to that view, I feel that the trouble is that when we need it it is going to be too late if we do not include it now.

Senator Walker: What has happened already to make you say that?

Senator Croll: There was evidence presented at the hearings before Senator Prowse, in detail, of matters that occurred, and I think that should be looked at before we make up our minds or reach a conclusion that there are no such instances. There are many of them, and I think they were recited there and will be recited again before this committee.

Senator Lang: If the word "incites" was substituted for the words "advocates or promotes," as in the first phrase of section 267A(1)—"Every one who incites genocide..."—would not that be much more in conformity with the spirit of the convention than the words here?

The Chairman: The distinction between the two words is, for example, I may advocate to you and have no effect on you whatever; but if I incite you, it would have to be proven that you were incited.

Senator Prowse: That you acted as a result of the action.

The Chairman: In other words "inciting" is much more cogent than "advocating".

Senator Prowse: We are saying that if anybody goes around and says that any identifiable group of people should be killed, should not be allowed to have children, should be got rid of or sent back somewhere, or something else of that kind—it seems to me to be a reasonable basis, because there have been things like that said and there will be things like that said again. We are seeing violence in areas of this country right today which we thought impossible.

Senator Choquette: But who takes them seriously?

Senator Prowse: People who break up computers, we take them seriously.

Senator Choquette: You hear people say every day, "Let's throw all those damned Frenchmen into the St. Lawrence, and get the country rid of them once and for all!" Is not a person saying that a nut or a crackpot? There are 220,000 Jews in this country, the same

number as Indians, and they want to put us all in straitjackets just because of some crackpot who makes statements such as the one I have just made. Surely, we are grown-ups, we are not going to act like children? I do not see the necessity at all. That may be beside the point, but I think the witness should be allowed to proceed.

The Chairman: I agree with the senator that the witness should be allowed to go ahead.

Mr. Scollin: Before going on, perhaps I could draw to your attention...

Senator Lang: Could the witness answer my question, Mr. Chairman?

Mr. Scollin: The question of "incitement" as against "advocating"?

Senator Lang: Yes.

Mr. Scollin: I think "inciting" would require something much more specific in the way of an overt act than simple advocacy. I think one could clearly draw the line between performing advocacy before the Supreme Court and inciting the Supreme Court to find in your favour. There is a definite distinction between the two.

I think section 267A is designed to strike the lesser of these two situations, the simple advocacy, the promotion of it, the suggestion it is a good thing, without actually inciting anyone to do it in a particular case.

Perhaps I could just refer to the Special Committee's Report and, in so far as the bill does incorporate the general lines of the committee's report, I think perhaps some of the arguments pro and con are really to be found in the report of the committee itself. At page 62 the report states:

But because existing Canadian law already forbids most substantive aspects of genocide in that it prohibits homicide or murder vis-a-vis individuals, and because it may be undesirable to have the same acts forbidden under two different legal categories, we deem it advisable that the Canadian legislation which we urge as a symbol of our country's dedication to the rights set out in the Convention should be confined to "advocating and promoting" genocide, acts which clearly are not forbidden at present by the Criminal Code.

They go on to observe that, in their views:

...there is no social interest whatever in allowing advocacy or promotion of violence even at the highest level of abstract discussion. It is odious and unacceptable at any level.

They also state:

The serious discussion, even at the most abstract level, of genocide as a conceivable political or social policy, is simply not tolerable in a civilized community; it has no social value whatever.

At page 67 they make the observation:

The history of law and opinion as concurrent developments is replete with instances, as A. V. Dicey long ago indicated, not only where law reflected the state of opinion but where a fluid opinion was itself crystallized by law. This generation of Canadians is more sensitive to the dangers of prejudice and vicious utterances than ever before. Such public opinion, therefore, should now be prepared to crystallize these sensitivities, fears and doubts into positive statements of self-protecting policy—namely statements of law.

I think those statements indicate the background to section 267A which follows in large measure what the special committee recommended.

Senator Walker: This is Professor Cohen again.

Mr. Scollin: No, this is the unanimous conclusion of the committee which consisted of Professor Cohen as Chairman; Dr. Corry, Principal of Queens University; L'Abbé Gerard Dion of the Faculty of Social Sciences of Laval University; Mr. Saul Hayes, Q. C., Executive Vice-President, Canadian Jewish Congress; Professor Mark R. MacGuigan, Associate Professor Law, University of Toronto; Mr. Shane MacKay, Executive Editor, Winnipeg Free Press; and Professor Pierre-Elliott Trudeau, Associate Professor of Law, University of Montreal.

Senator Lang: Am I correct in thinking, then, that this wording goes beyond what is contemplated by the convention?

Mr. Scollin: It is different from the wording of the convention.

Senator Lang: It is broader, is it not.

Senator Walker: It is more incisive. It goes further. "Advocates" adds nothing to that, but "incites" is something else.

The Chairman: "Advocate" may be an attempt to incite.

Senator Croll: At what page are you looking now, Mr. Scollin?

Mr. Scollin: I am looking at page 289 which contains the United Nations document.

Senator Prowse: Section 266B uses the word "incites". The violence in the universities today is entirely the result, I would think, of people at the academic level saying that the only way they are going to get results is by being rough with people.

Senator Lang: I hope you are wrong, senator.

Senator Prowse: I hope I am wrong, but I am afraid I am right.

Senator Walker: Do you think that that is what this section means?

Senator Prowse: It means that in this section we are saying that there is no place in Canada for anybody at any time who as a solution to any kind of problem advocates that any of these things be done with a particular identifiable group.

Senator Cook: In due course, Mr. Chairman, I would be interested to hear what is going to be said if we put this section through, because I cannot conceive of anybody, except a few crackpots, being upset by the section.

Senator Choquette: That is right.

Senator Cook: I ask: Who is going to be upset if we put this section through?

Senator Walker: If that is so, we do not need the section.

Senator Lang: My question is still with the witness, I think.

Senator Walker: Yes, you are quite right.

The Chairman: Then perhaps we can remain silent while the witness answers.

Mr. Scollin: I think, senator, I would agree that "advocates or promotes" as used in section 267A does go further than any of the phrases used in the convention, namely, conspiracy to commit, direct and public incite-

ment to commit, attempt to commit, and complicity in, genocide. Advocating and promoting do not require proof if incitement. They do not require proof of conspiracy, and they certainly fall far short of attempt. So, I would agree.

Senator Lang: Thank you.

Senator Hollett: I have an idea that all of us in the Senate are guilty of genocide because a short time ago we passed a bill allowing the sale of contraceptives. This section provides that one is guilty of genocide if he deliberately imposes measures intended to prevent births within a group. That is exactly what that measure does. It prevents births within the group of Canadians.

Senator Prowse: But it has to be for the purpose of destroying the group. There has to be that particular intent.

Senator Hollett: I think you will hear comments with respect to that particular section. In my view we are guilty of genocide if...

The Chairman: But not with contraceptives.

Senator Hollett: We are allowing people to sell those things, and they are being sold to prevent births.

The Chairman: But it is not directed towards any identifiable group. Everybody is doing it.

Senator Hollett: But there is no need for us to aid and abet them.

The Chairman: Gentlemen, it is 20 minutes to 12, and I would like to hear the balance of what Mr. Scollin has to say. We can argue things of this kind by the hour.

Mr. Scollin: Perhaps before leaving subsection (2) I should point out that paragraph (b), "causing serious bodily harm or mental harm to members of the group," which does come from the convention, was not among the recommendations of the special committee. Paragraph (e), "forcibly transferring children of the group to another group," was also not among the recommendations of the special committee. Those two were designed to...

Senator Choquette: Who is responsible for putting them in?

Senator Lang: I think that that is a question the witness can decline to answer.

The Chairman: I think he has tried to answer it.

Senator Croll: Can we not let Mr. Scollin continue?

Mr. Scollin: I said, and perhaps I do not need to repeat it, that I really cannot speak in respect of many of the policy matters contained in this bill. I can try to explain what is meant by the bill, but there are areas in which I am limited to speculation, which really would not be justifiable and which might very well be embarrassing. These two paragraphs, in any event, were not among the recommendations of the committee.

Another variation in the section from the recommendations of the committee was the use of the words "any group of persons". In the committee's report, the recommendation was that the genocide provision should relate, as does the rest of the bill, to what has been defined as the identifiable group. Again, I am not really in a position to explain as a matter of policy the variation in wording which occurs here. At page 69 you will see that in subsection (5) of the principal recommendations the committee says:

"Genocide" means any of the following acts committed with intent to destroy, in whole or in part, any identifiable group.

Indeed, it might be thought that the logic of subsection (2) would include any "unidentifiable" groups.

Senator Lang: Would it include groups such as, say, the Scottish Presbyterians?

Senator Prowse: That is a good idea.

Senator Lang: That may not fall within the definition of "identifiable group," but it would be a group of persons.

Senator Prowse: Scottish Presbyterians are identifiable.

Mr. Scollin: In my experience, nobody worries about advocating or promoting the destruction of that group!

Senator Walker: Nor any other group. These things are very often not said seriously. Who is going to be the judge of whether they are or not?

Senator Lang: This is a very serious question.

Senator Walker: I know you are giving an example.

Mr. Scollin: I think the way that would be construed is that a definite group, whether or not it is made on the basis of the tests of "identifiable group", which is colour, race or ethnic origin, would be covered by section 267A. In any event, the committee may wish to consider whether or not if section 267A is passed it should pass with the words "any group" or "any identifiable group".

Senator Lang: The words "any group of persons" is therefore much broader than the definition "identifiable group".

Mr. Scollin: Yes, it is.

Passing on to section 267B, perhaps I should read the part that I am about to deal with immediately. Subsection (1) says:

Every one who, by communicating statements in any public place, incites hatred or contempt against any identifiable group where such incitement is likely to lead to a breach of the peace,

It is here necessary to refer to the definitions contained in subsection (5) of that section. First of all "every one who, by communicating statements", What does "statements" mean? "Statements" is defined in subsection (5) paragraph (c). It is defined there to include:

words either spoken or written, gestures, signs or other visible representations.

Senator Prowse: Would that include a television broadcast?

Mr. Scollin: I would think if this were done pictorially on television, by way of cartoon, for example, it certainly would be a visible representation. If the words were spoken, on say a pre-recorded program, it would seem to me they are none the less spoken words. If the material on television, either written or printed and reproduced, was offensive within the meaning of the section, then it would be included in the word "statements".

Senator Prowse: Would a radio be a public place?

Mr. Scollin: It would depend where the radio was, I suppose. If you put it in Nathan Phillips Square and turned up the volume, I would think that whatever came out of it verbally would be a statement within the meaning of the definition, and if it were made publicly in a public place as defined in subsection (5) it would be within the evil the act is intended to remove.

Senator Choquette: It all depends on the audience. If I go to a group of English-Canadians and speak for an hour against French-Canadians I am likely to be applauded and certainly it is not likely to lead to a breach of the peace; but if I go to Quebec and damn the French-Canadians it is likely to lead to a breach of the peace. You have to choose your audience.

Senator Prowse: You could stand outside the church after mass on Sunday morning and harangue them.

Mr. Scollin: This is a matter I might deal with later. There is a variation here between the provision in Canada and the provisions under the British legislation where the words "publish" and "distribute" are restricted to:

distribute to the public at large or to any section of the public

with the qualification

not consisting exclusively of members of an association of which the person publishing or distributing is a member.

That qualification does not appear in this bill here. Perhaps I could go on.

Senator Lang: That is in the English act?

Mr. Scollin: That is in the 1965 English act.

Senator Choquette: How many attempts were made in England to pass such a bill? They came back year after year ten or twelve times, did they not?

Mr. Scollin: I do not know how often before 1965 incitement to racial hatred was before the house. The first national act designed to preserve public order was the 1936 Public Order Act, passed at the time of the Mosley riots. Previously various municipal acts prohibited much the same thing, quite effectively, but in 1936 there was the first act directed to insulting or abusive behaviour in public likely to create trouble. I do not know how often the 1965 broader proposals were before the British house.

Senator Lang: Have you any experience of the British people under the new act? Have you heard anything?

Mr. Scollin: In due course, although it is all second hand, I hope to refer to a recent article in the 1968 *Criminal Law Review*, at page 489, where Professor Dickie has analyzed the prosecutions and the outcome of

all the prosecutions under the race relations act incitement to racial hatred provision. There have been some 14 or 15 prosecutions, and I thought that perhaps later on I could at second hand recite the conclusions.

Senator Lang: Thank you very much.

Mr. Scollin: If I may go back to the section, I had dealt with the meaning of the word "statements" as defined there. The second essential under the act is that it should be in a public place.

"Public place" is defined on page 2, subsection (5), paragraph (a) and it follows exactly the definition of "public place" which presently appears in section 130 of the Criminal Code. That section 130 appears in Part IV of the Criminal Code which deals with sexual offences, public morals and disorderly conduct. As the present proposal, section 267, would appear in Part VI it was necessary to provide a fresh definition. The definition given in section 130 only applies to Part IV of the Criminal Code, but the definition is exactly the same.

Senator Cook: That is why it is repeated here.

Mr. Scollin: That is why it is repeated, yes. "Incites hatred or contempt," the words "hatred or contempt" already appear in the provisions of the Criminal Code dealing with defamatory libel.

Senator Cook: What section of the code is that?

Mr. Scollin: Section 248, subsection (1) where defamatory libel is defined as "Matter published without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt..." and then it goes on, of course, in that section to add the words "...or ridicule", which is not included in section 267.

Senator Croll: The absence of a person.

Mr. Scollin: I will deal with the absence of group protection later on if I may. So, the second requirement is inciting hatred and contempt. The third requirement is that this hatred or contempt should be incited against an identifiable group. An identifiable group is defined in subsection (5), paragraph (b) as meaning any section of the public distinguished by colour, race or ethnic origin.

Now, this is not the same as the recommended definition that appears in the special committee's report, in their draft, which appears on page 70. Six tests were set up there as being the distinguishing marks for the purposes of an identifiable group. The bill uses only three of these. The special committee recommended that this definition "identifiable group" means any section of the public distinguished by religion, colour, race, language, ethnic or national origin. The bill does not contain the tests of religion, language or national origin. This perhaps can be compared with the Race Relations Act 1965, in the United Kingdom. This act has been replaced by a 1968 act. I have not got a copy of it, but we should get one shortly. It was only passed in October or November—but in respect to these incitement provisions I believe the act remains the same.

On discrimination, the following provisions have been made: section 6 of the act of 1965 uses the words "with intent to stir up hatred"—it does not include the word "contempt"—against any section of the public in Great Britain, distinguished by colour, race or ethnic or national origin.

Senator Choquette: Why is religion left out or is it going to be left out? I insisted when I spoke on this that if there is one word that should be included it is the word "religion". You have got Protestants, Catholics, and Jews in Canada, as large groups. So if you are going to insult one group it would be one of those three and why "religious groups" or the word "religion" is left out I do not know. I do not understand. Senator Prowse has an explanation.

Senator Prowse: Mr. Scollin can give it. It is a very ingenious one. I have been quite taken with it ever since I heard it.

Mr. Scollin: Perhaps it is ingenuity that is more apparent than real. Certainly, some critical observations were made by Dean Cohen and others when they appeared later in the course of the previous hearings. The explanation, which perhaps I should call the speculation, was that: it is considered that "ethnic" covers "national". But so far as Canadian conditions are concerned toward ethnic, it covers the total ground that needs to be covered. That is the view that was taken. With regard to the word religion it was considered that, since this is a matter which can be the subject of, and can be changed by

debate and discussion, even a very vigorous and brutal form of religion as distinct from the other attributes, ought not to be a test. The other tests of colour, race or ethnic origin are refutable. They are matters that can be changed by debate in any way and the same is basically true of language.

So, good or bad, this was an attempt to perhaps rationalize or reason why word "religion" was omitted and why the word "language" was omitted. I do not think any terribly serious consequences flow from the fact that the word national is omitted. The only two that might create any problems are language and religion.

In answer to that, Mr. Garber in the proceedings previously, on February 29, 1968, and Mr. Hayes and Dean Cohen all expressed the view that the omission of the word "religion" might result in the bill not reaching anti-Semitic propaganda, on the grounds that the Jewish people are basically a religious group. This is the one connecting link between persons of Jewish origin who may come from Scotland, Germany, Russia, who may belong to various different national groups or whose descent may be traced to different races.

All I can do, is repeat the explanation—or, perhaps not "explanation," perhaps "rationalization," or whatever it is, I gave before and to point out that this matter was in the minds of the legislators in the United Kingdom when the Race Relations Act was being debated in 1965 and, again, when the 1968 act was being debated.

During the Second Reading of the 1965 bill—you will recall that that bill, as it was passed into law, does not contain the word "religion"—the Home Secretary said:

It is certainly the intention of the Government that people of Jewish faith should be covered.

Perhaps somebody might read something into the fact that he used the word "faith".

The words have to be construed in law according to the ordinary canons of construction, as an ordinary person would read ordinary English language. I would have thought a person of Jewish faith, if not regarded as caught by the word "racial" would undoubtedly be caught by the word "ethnic", but if not caught by the word "ethnic" would certainly be caught by the scope of the word "national", as

certainly having an origin which many people would describe as an ethnic if not a racial origin.

Certain attempts were made during the committee stage of the 1965 bill to introduce the word "religion". During the committee stage of that section of the 1965 bill dealing with "incitement" the Home Secretary said:

Where there is clear evidence however the propaganda is dressed up, whatever the specious arguments are that (a person) has it in mind not to criticize a particular religion but, to use it as a pretence of disguise his intention to stir up hatred against a particular section because of origin, I do not believe that any jury will have much difficulty in coming to a conclusion whether the prosecution have established that intent beyond reasonable doubt.

So, the view taken in the United Kingdom appeared to be that their legislation would work.

In these cases which I will refer to later, some of the charges have involved a combination of anti-Semitic and anti-coloured immigration material, and convictions have resulted. Unfortunately, these cases have not, on the whole, received very much in the way of publication in the law reports, and the references are simply to newspapers.

Senator Choquette: You see, Mr. Scollin, if we do not include the word "religion," any body can say after the Encyclical of the Pope, "Let's get rid of that wop, that Italian, and all his followers!" That is a tall order, and you could not do anything against a person who makes such a statement. A religious group is a large one, and from the representations we have had here, the Jewish people told us it was a faith, it was a religion. I think Senator Roebuck will recall that they insisted the Jewish people had one religion, and they seemed to insist on the word "religion" being inserted. Is that not right?

The Chairman: I think they did.

Senator Prowse: I think they did. I personally cannot see any reason why, in a thing like religion, and particularly where we are supposed to live on the basis of "Love thy neighbour," we should give them the right to say all kinds of nasty things about each other. I think we are all familiar with the statement that there have been some monstrous things done in the name of religion.

I think "religion" ought to be in there, despite the very ingenious and plausible argument we are dealing with things people cannot change.

You may recall at the last meeting, Mr. Scollin, we decided to get the dictionary and find out what "ethnic" meant. It came as a surprise to me to find in the Oxford Dictionary that "ethnic" means "Gentile or non-Jewish". We could not find any dictionary that gives the meaning we have in here.

It seems to me that if I were a lawyer let us say of inciting the extermination of the defending a person, particularly on a charge, Jews, I would bring out my dictionary in front of the magistrate, and I would have a good time in front of a whole lot of magistrates. I do not know about the Supreme Court of Canada, but I think I would get quite a way with my dictionary and this act where you see "ethnic" and you do not use "national". I think we should have "national and religious" because "ethnic" does not have a precise meaning at all.

Senator Lang: There are many spurious groups that masquerade under "religion". One of them is a group called the Scientologists, from what I read in the papers, who masquerade as a religion. If the press reports are correct, this group is an aberration of a rather dangerous nature.

If you use "religion" you are going to bring in a lot of kook areas and give them protection against what may be very beneficial public criticism. So, we have to weigh carefully the inclusion or exclusion of any of these words. I think there are many other groups would fall in the same category, so-called religious groups. They masquerade under a religious camouflage.

Senator Prowse: And they are taken quite seriously.

Mr. Scollin: Well, Mr. Chairman and gentlemen, it may be that in the course of the hearings the considered reaction of perhaps the major organized church groups might be of some assistance, if they are invited to deal with this matter.

The Chairman: I think we can pass it now. We have discussed it for a few minutes. We will bear it in mind. There are others, as the witness has suggested, who may have some views in connection with it that we ought to hear before we come to a conclusion.

Mr. Scollin: So much then for the third element, the question of identifiable group.

The fourth element that has to be shown for a conviction under subsection (1) of section 267B is that such incitement is likely to lead to a breach of the peace. This wording is taken from page 69 of the report of the special committee.

The use of the word "likely" is justified by reference to other sections of the Criminal Code itself and also the provisions of the Race Relations Act of the United Kingdom, where one of the essentials of the offence of public incitement is that it be done to invoke a breach of the peace, or whereby a breach of the peace is likely.

The offence under section 267B(1) is either indictable—it would be, of course, at the option of the Crown as to whether it is treated as indictable or on summary conviction. The maximum penalty is imprisonment for two years. Naturally, as with any other offence of that sort carrying that penalty, it would be open to the court to impose a fine with imprisonment in default. In the alternative, the offence is punishable on summary conviction, in which case it would carry the standard fine provided for by the court of \$500, or a maximum of six months' imprisonment, or both.

The Chairman: Six months, or two years?

Mr. Scollin: No, on summary conviction it is six months.

The Chairman: I was mistaken.

Mr. Scollin: In the case where the Crown elected to proceed by way of indictment—that is, under paragraph (a) of this subsection—the accused would have the right to elect to be tried either by a magistrate, or by a court composed of a judge alone, or by a court composed of a judge and jury.

Senator Willis: Mr. Chairman, I do not like the word "likely" in there. I think any defence lawyer would be able to get anyone off if a riot did not occur, or a breach of the peace did not occur. Who is to decide whether it is likely to occur? The accused must be given the benefit of the doubt. I could get anybody off under that section.

The Chairman: In the *Beattie* case in Toronto the magistrate held that the words were, in the circumstances that they were delivered, likely to cause a breach of the peace, and did cause a breach of the peace.

Senator Willis: Well, if they did cause...

The Chairman: He made a distinction between the likelihood and the actual fact.

Senator Willis: I agree that if a breach of the peace followed then there is no problem but if there was no actual breach of the peace then I think the word "likely" gives an accused a perfect defence.

Mr. Scollin: It did not seem to give the magistrate very much trouble in the *Beattie* case, because he said:

After listening to a recording of the speech in question given in evidence in court, and upon reading a transcript of the recording, I have no hesitation in stating that the language used was most insulting, both to Jews and Negroes and would likely or probably cause hatred to be stirred up in the park as against the ethnic groups mentioned.

From the circumstances there it was quite evident that he was prepared to find that this was likely to cause a breach of the peace.

These words are also used in section 166 of the Criminal Code itself, which reads:

Everyone who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.

So, there is legislative recognition of this as a test, and presumably a test that a court is regarded as being able to apply.

This is also recognized in the defamatory libel section, section 248(1) which reads:

A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule...

It is not necessary in this case to show that he was in fact so exposed. It is sufficient that the material itself demonstrates beyond a reasonable doubt the likelihood of that result following.

As I say, it does appear in the United Kingdom legislation as an alternative to the proof of intent to provoke a breach of the peace, the wording being "whereby a breach of the peace is likely".

I think the object of the section is to enable action to be taken, and if necessary a prosecution instituted, where the circumstances, including the use of the words in and what is said, indicate that if this goes on and is allowed to continue there is going to be a breach of the peace. I would not think, as a practical matter, that a court would have a great deal of difficulty in a proper case in saying: "I am sure a breach of the peace was going to happen if this fellow had not been stopped."

Senator Prowse: This permits the police to step into an explosive situation, and take action before it explodes?

Mr. Scollin: Quite.

Senator Prowse: And if there was no explosion then this would be a factor of which the defence would undoubtedly make quite a lot.

Senator Willis: That is my point.

Senator Walker: Have you not that protection now under the Criminal Code?

Mr. Scollin: No, I do not think the Criminal Code at the moment does enable action of that sort to be taken.

Senator Lang: Under what section was *Beattie* prosecuted?

Mr. Scollin: Under a by-law. Section 160 of the Code which is the causing a disturbance section, actually requires just that.

Senator Lang: Just what?

Mr. Scollin: That a disturbance be caused. For example, paragraph (a) deals with:

Every one who
(a) not being in a dwelling house causes a disturbance in or near a public place,
(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

The essential requirement there is that not only does he use the insulting or obscene language, but he thereby, not being in a dwelling house, causes a disturbance in or near a public place, so you have got to have a pretty fair disturbance going on before the police are entitled to intervene.

Senator Willis: Then they would just be subject to a fine or two years imprisonment.

Mr. Scollin: This is, of course, an alternative. It is very similar to many sections of the

Criminal Code which provide similar alternatives. The object is to enable the Crown in a very serious case, where it feels it is merited, to proceed by indictment. For example, assume a man had been convicted 28 times in the course of the year of the summary conviction offence. It would seem to me the Crown could then very easily justify saying, "You have been a very naughty fellow and this time we will invite the court to impose a more serious penalty to deter others." The fact is, it is in there and has to be left to the discretion of the Crown, as in a number of other similar alternative provisions in the Criminal Code.

Senator Prowse: This is the minimum and maximum for an indictable offence.

Mr. Scollin: There are in the Criminal law some exceptions in which an indictment less than two years is prescribed, but by and large this is a fairly standard formula, two years for an indictable offence and an alternative on summary conviction. Even if the prosecution is upon indictment and the man goes before a judge and jury, if the jury convict him the judge may very well, notwithstanding that the Crown proceeded by way of indictment, fine him within the range of penalties under summary conviction. The mere fact that a man is convicted of an indictable offence does not mean the penalty will necessarily be more severe.

Senator Croll: There are dozens of such cases under the Criminal Code where repetitious offences are dealt with in that fashion.

Mr. Scollin: Where it is open to deal with repetitious offences.

Senator Prowse: Typically, impaired and drunken driving.

Mr. Scollin: Impaired and drunken driving can be treated either on indictment or by way of summary offence.

Senator Prowse: To be charged with an indictable offence is in a great many instances considered an advantage by the defence lawyer.

Mr. Scollin: In this area particularly it may very well be an advantage to have a jury.

Senator Prowse: To have access to a jury, and the sentence, regardless of the maximum here, will be set by the court or the appeal court on the basis of the public harm done.

Senator Lang: Am I correct in understanding the witness said that the provisions of the Code are extended by the section from a case where a breach of the peace does occur to a case where a breach of the peace is likely to occur?

Mr. Scollin: Yes.

Senator Lang: I should like to draw the committee's attention to the other edge of the sword, to what I consider one of the great dangers of the section. From what I have been able to learn, in Germany, in the early days of the National Socialist Party, the German law had a section somewhat similar to this. When persons who opposed the National Socialist Party made their views public, the Nazis would gather a crowd of their own in front of the speaker and create a condition likely to lead a breach of the peace, and immediately thereupon insist that the authorities arrest the speaker. This is one of the great dangers in this sort of legislation. I can foresee how a group, acting with completely legitimate objectives and in the best interests of the state, could be prosecuted because their opponents created a situation which was likely to lead to a breach of the peace in front of their speaker and forced the authorities to arrest them.

Mr. Scollin: This could only arise under the section if in fact the Crown were able to establish the essential ingredient that the speaker had incited hatred or contempt against an identifiable group. On page 129 of the Report of the Special Committee on Hate Propaganda in Canada reference is made to the judgment of Mr. Justice Cartwright in the case of *Frey v. Fedoruk* in which he said:

I do not think that it is safe to hold as a matter of law, that conduct, not otherwise criminal and not falling within any category of offences defined by the criminal law, becomes criminal because a natural and probable result thereof will be to provoke others to violent retributive action.

Later on he said:

The speaking of insulting words unaccompanied by any threat of violence undoubtedly may and sometimes does produce violent retributive action, but is not criminal.

It is undoubtedly the case that in a prosecution under section 267B the speaker brings himself within the criminal law by his own

action and because of the reaction of the audience there is likely to be a breach of the peace, but the safeguard is that he has not committed a criminal act unless he has incited by statements that are inciting hatred or contempt.

Senator Willis: I think, Mr. Chairman, your experience is that things like this happen in the early days of elections in Ontario.

The Chairman: You bet they did.

Senator Willis: They happened regularly from 1875 until the 1920s.

The Chairman: That was when they conducted the campaign with whippletrees. We have pretty well got over that.

Senator Prowse: We do not have those engaged in politics as an "identifiable group" in this bill. Perhaps we should have.

The Chairman: Honourable senators, it is half-past twelve. I know Mr. Scollin has not covered all the ground. I think I am correct in that, am I not?

Mr. Scollin: Yes, Mr. Chairman.

The Chairman: Perhaps it is time we adjourned. I do not know what the committee feels about it. Is it the consensus that we adjourn?

Hon. Senators: Agreed.

Senator Lang: Mr. Chairman, this has been a very useful morning. I would like to take lots of time with our present witness. This has been a most helpful presentation and discussion.

The Chairman: Let us understand that we will ask Mr. Scollin to come before us again.

Senator Croll: May I suggest that when Senator Lang says that it has been a useful morning he underestimates its value. It has been more than a useful morning, but I do not think you should call us back into meeting until a record of today's proceedings is available so that we can see exactly what has been said.

Senator Lang: We will not be meeting next week, I presume, Mr. Chairman, so that the record will be available to us.

Senator Croll: It will be available in four or five days.

Senator Cook: Mr. Chairman, the witness made reference to an article in the Criminal Code. Could that be photostated and circulated?

Mr. Scollin: Yes, I will have that done and send the proper number of copies.

The Chairman: Thank you all for coming. When we meet again the next time I think we can have some very interesting evidence. I rather expected we would have today.

In the City of Toronto someone has got a number where you can dial and a record plays, telling what s.o.b's the Jews are. We have that and I expected to have it here today, but we will have it the next time. I hope that all those who attended this time will be able to come back to the next meeting.

The committee adjourned.



First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA

PROCEEDINGS

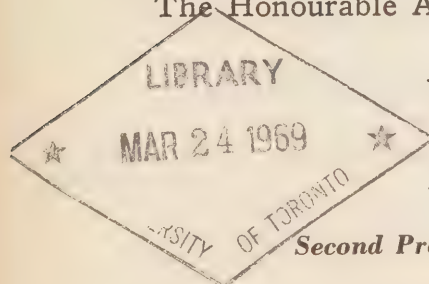
OF THE

SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*



No. 2

Second Proceedings on Bill S-21,

intituled:

"An Act to amend the Criminal Code".

TUESDAY, FEBRUARY 25th, 1969

WITNESSES:

1. Mr. K. Leigh-Smith, Assistant Vice-President, The Bell Telephone Company of Canada.
2. The Canadian Jewish Congress: Mr. Monroe Abbey, Q.C., National President; Mr. Louis Herman, Q.C., Chairman, National Joint Community Relations; and Mr. Saul Hayes, Q.C., executive vice-president.

The Queen's Printer, Ottawa, 1969

THE SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, Chairman

The Honourable Senators

Argue	Giguère	*Martin
Aseltine	Gouin	McElman
Bélisle	Grosart	Méthot
Choquette	Haig	Phillips (<i>Rigaud</i>)
Connolly (<i>Ottawa</i> <i>West</i>)	Hayden	Prowse
Cook	Hollett	Roebuck
Croll	Lamontagne	Thompson
Eudes	Lang	Urquhart
Everett	Langlois	Walker
Fergusson	MacDonald (<i>Cape</i> <i>Breton</i>)	White
*Flynn		Willis

(Quorum 7)

* Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,
With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative."

Extracts from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimbursement as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—

Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, February 25, 1969.

Pursuant to adjournment and notice, the Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Argue, Aseltine, Bélisle, Choquette, Cook, Croll, Eudes, Fergusson, Gouin, Grosart, Haig, Macdonald (*Cape Breton*), Prowse, Urquhart and Walker.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel;

The following witnesses were heard:

1. Mr. K. Leigh-Smith, Assistant Vice-President, The Bell Telephone Company of Canada.
2. The Canadian Jewish Congress:
Mr. Monroe Abbey, Q.C., National President;
Mr. Louis Herman, Q.C., Chairman, National Joint Community Relations;
Mr. Saul Hayes, Q.C., executive Vice-President.

At 4.30 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

L. J. M. Boudreault,
Clerk of the Committee.

THE SENATE

THE SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Tuesday, February 25, 1969

The Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The Chairman: Honourable senators, we now have a full house, and we have a full program.

I might say by way of introduction that we had a meeting of the steering committee yesterday and will have a full program for each weekly meeting until we recess for the Easter vacation. What is of immediate interest is the program for today which, as I say, is a full one and, I think, a very good one. You may remember that at the last meeting I mentioned an incident that is taking place, or has taken place, in the City of Toronto, where an individual has obtained the right to use a line, and is using it, for statements such as we hope to bring before you this afternoon.

In that regard, I have the pleasure of introducing to you Mr. Ken Leigh-Smith. He is Assistant Vice-President of the Bell Telephone Company of Canada, and is located here in Ottawa.

Mr. Leigh-Smith has a transcript which he wishes to lay before us of the actual words that are being used over their facilities. I will not say anything further, because I leave that to him.

Honourable senators, I now introduce Mr. Ken Leigh-Smith.

Mr. Ken Leigh-Smith, Assistant Vice-President, Bell Telephone Company of Canada: Thank you very much, Senator Roebuck.

Honourable senators, gentlemen: I should like to say, as Senator Roebuck has indicated, that we have provided for this committee

a written transcript of the messages that have been made available by means of this recorded announcement in Toronto by the Canadian National Socialist Party. In addition to the written transcript, we felt it might be helpful for you to get a better impression of the impact of these announcements by listening to a recording. First of all, I should like to apologize for these recordings, really on two counts. The first one is that the quality of the recording is extremely poor because, as you will appreciate, it was obtained by simply holding a telephone receiver as any subscriber would who chose to dial this number, except that he would hold it to his ear and we held it to the microphone of a tape recorder. The resulting quality is poor, and you may have some difficulty in following it. The second reason why I feel an apology is in order is that with regard to anything that is quite as vicious as these announcements obviously are, anyone should be able, in our free society, to make use of the services of a public utility in order to spread and disseminate vicious material of this kind.

The Chairman: You say we should not?

Mr. Leigh-Smith: I say we feel, certainly, most disturbed, that we are apologizing that it is possible for a group of this kind.

Senator Croll: What have you done to avoid coming here to apologize?

Mr. Leigh-Smith: In answer to your question I will say that the action we have been unable to take, and which we would have dearly liked to have been able to take, arose from our position and obligations as a public utility. We have to serve within the limits of the legislation that has been provided for us—within the limits of the Railway Act and within the limits of our charter.

I think those of us who are close to this problem will realize that the one thing that would serve the purposes of the Canadian

National Socialist Party the best, and which would give them the kind of publicity they would like to have, would be a public utility's arbitrarily cutting their service. They could take us to court. They could very likely successfully sue us. The resulting publicity of the message would give it far more coverage and far more public attention than it would receive otherwise.

Senator Croll: Mr. Leigh-Smith, there are any number of Ontario Acts or Dominion Acts under which you could have taken action—perhaps unsuccessfully, but you could have taken action. Why did you not take action?

Mr. Leigh-Smith: Perhaps I might be permitted to answer your question in a little more detail. The first reason, and the reason I have just mentioned as the guiding reason, was that we did not feel that the provisions of our Act of Incorporation, the Criminal Code, or our general tariff permitted us to do so. You now ask why we did not do it anyway; why did we not break the law; why did we not break the provisions of our tariffs why did we not defy the specific provisions of our charter...

Senator Croll: Just a minute; I did not suggest that you break any law or that you defy the charter, or that you do anything improper. All I suggested was that you test the rule. You are now doing something in connection with cable TV, and many people say that in that respect you are breaking the law. As a matter of fact, the Government is looking into the matter in order to determine whether you are doing anything contrary to The Combines Investigation Act. So, they are taking a good look at you.

Mr. Leigh-Smith: I understand.

Senator Croll: What I want to know is why, in view of what was happening you did not test the law. I am not interested in giving the matter publicity. I am interested in knowing why you did not do something bold in finding out what the law says, because I do not think the law means what you think it means. Instead of that, you allowed the thing to go on.

Mr. Leigh-Smith: I am sorry if I misinterpreted your remarks sir. It was felt that by testing the law we would run the risk of breaking the law, because a test is something to decide whether or not you have broken the law. You suggest that we should have run the

risk of breaking the law. I can only say in answer to that that we feel it would have served their purposes admirably to have done this.

Senator Croll: But the courts might have said that you were right. Did that never occur to you?

Mr. Leigh-Smith: It occurred to us as a possibility, but let me read to you and the other honourable senators, who are as concerned about this problem as we are, a few excerpts from the charter which put us in a position of really not standing a chance of having a decision in our favour.

Senator Cook: It might serve our understanding better if we have the recording now.

The Chairman: No, we will get to the recording in a moment.

Senator Prowse: There is one point that I think that Mr. Leigh-Smith is going to make, and which I thought he did make in his original presentation and before Senator Croll asked his question. He said that the reason why they did not take the matter to Court was because they felt that if they did so it would give this particular guff a publicity which it would not otherwise have, and that they would thereby do greater harm to the very people they were concerned about. Perhaps Mr. Leigh-Smith can tell me if I misunderstood him or not.

Mr. Leigh-Smith: No, sir, this is precisely the point that I hoped I had made clear. You have made it much clearer than I did.

Senator Walker: You said that originally.

Mr. Leigh-Smith: This was our feeling, that by taking any overt action we would in fact give them the publicity they were seeking, and which, in our opinion, they were unsuccessfully attempting to gain.

Senator Prowse: And which they may even have been after?

Mr. Leigh-Smith: Yes.

Senator Choquette: Mr. Leigh-Smith, why be afraid of anybody or any organization who wants to rent your service. If these people come to you and say: "We are going to have a record made. People will dial a number and hear a little speech", surely, the Bell Telephone Company can say, "We do not like that. We are not going to rent you that num-

ber for that purpose." I do not see any difficulty in eliminating it. Surely you have a choice. Nobody can force any type of propaganda or record-playing to be transmitted over your lines without your admitting you are going to accept it. Is not that so?

Mr. Leigh-Smith: I am afraid it is not, sir. Perhaps I might quote an item from the Act of Parliament that was passed in 1968 and which, therefore, represents the current thinking of the Parliament of Canada:

The company shall, in the exercise of its power under subsection (1)...

which outlines our general powers.

... act solely as a common carrier, and shall neither control the contents nor influence the meaning or purpose of the message emitted, transmitted or received as aforesaid.

Now, further on. . .

Senator Macdonald: That does not answer your question.

Senator Choquette: No.

Mr. Leigh-Smith: It answers the question as to why we cannot act as a censor of any kind. We have no mandate or ability to act as a censor so as to be able to tell an individual that we, the telephone company, think his message is unacceptable.

Senator Choquette: Surely you can say, "We are not going to rent you the facility. We do not need your business"? You are not acting as a censor there. You do not have to give any reason.

Senator Croll: You can decide that you will not sell me any cable space. You arbitrarily decided when I applied—not in my own name, but when I made an offer for the use of cable facilities you said: "No, we are not going to sell to this fellow, or to that fellow." This is what you have admitted before the Commission. You have done that.

Mr. Leigh-Smith: I am afraid, sir, that to answer your question would get us embarked on an argument that is not really germane to what we are discussing here, but, to answer your question, another quotation that applies directly to our ability to serve or not to serve reads as follows:

Upon the application of any person, firm or corporation within the city, town or village or other territory within which a

general service is given and where a telephone is required for any lawful purpose, the company shall—

Notice the word "shall"—

the company shall, with all reasonable despatch, furnish telephones of the latest improved design then in use by the company in the locality and telephone service for the premises etcetera.

This is the obligation that a public utility, the telephone company, must observe regardless of who the person is applying. If he is within the territory served by our company and he applies for a local service we cannot say, "We do not like the colour of your hair. We do not like your religion. We do not like your race. We do not like your views on society."

Senator Choquette: We would like to know what kind of garbage you intend to serve and let us listen to it. We want you to say, "We do not sell that in the market".

Mr. Leigh-Smith: I would be happy, as I am sure my company would, to gladly accept and apply any legislation which would permit us to act in the way you have suggested.

Senator Choquette: No legislation forces you to accept that kind of contract. You cannot convince me of that. If I have a store and do not want to sell to a man who says to me, "You have a licence. You open your door"—

The Chairman: You do not have a franchise to run a store. These people have one.

Senator Haig: I am getting a little puzzled on this question. Bell Canada rented certain time on their system to this person or persons who produced a program so that anyone could phone a number and listen to that program. Is that correct?

Mr. Leigh-Smith: What we do is to provide them...

Senator Haig: In this case we are going to hear about what did you do?

Mr. Leigh-Smith: The National Socialist Party came to us as an individual. The individual's name was Mr. Beattie. He said to us, "I wish to rent a line in the City of Toronto, a line of telephone service. I want a regular telephone number." We asked, "Is there anything particular in the service? Do you want a black set or not?" He said, "All I wish to do is to make a recorded announcement available." We asked whether it was a standard type of message such as "Dial-a-

prayer", "Dial-a-recipe", or dial the weather or dial the time. If somebody dials the number they get the message on the recorded announcement. He said, "That is the kind of service I want, and it is in your tariff."

Senator Haig: You just provided him with a telephone?

Mr. Leigh-Smith: All we did was to provide him with a line into his premises, and, as any customer would, he connected up his recorded announcement.

Senator Prowse: He got the same kind of phone as I would get if I asked for a telephone service?

Mr. Leigh-Smith: That is correct, but in addition he got the attachment—I am not able to tell you exactly what the technical component of the attachment is—so that he could transmit from his tape recorder over the line instead of speaking himself, which he could have done, he could personally have read the message.

Senator Haig: Nobody could hear it unless they dialed the number?

Mr. Leigh-Smith: Nobody could hear it unless they voluntarily chose to dial that number and wanted to hear it.

Senator Haig: How did the public know this number was available to get the message?

Mr. Leigh-Smith: Unfortunately it got publicity, sometimes from the people who wanted to suppress it.

Senator Croll: The number did not get publicity.

Senator Haig: How did anybody know the telephone number?

Senator Croll: They would not know unless somebody told them.

Senator Urquhart: Were there any newspaper advertisements giving the number?

Mr. Leigh-Smith: I am not in a position to know that.

Senator Urquhart: You do not know?

Mr. Leigh-Smith: No, I do not know.

Senator Haig: You do not know how many people heard it?

Mr. Leigh-Smith: You might be interested in knowing that a very effective job was done by members of the Toronto community who chose to dial the number and leave their receivers off the hook.

Senator Choquette: I was going to suggest that.

Mr. Leigh-Smith: Anybody else who then wanted to listen to the message got the busy signal. I understand this was done in relays, so this man had a very frustrating experience. This is why I repeat that I think he would have liked nothing better than for the telephone company to test the matter, when he would have got front page stories for a long time while the case was in the courts.

Senator Cook: He got it anyway. He went to jail for something else.

Mr. Leigh-Smith: I do not know. As far as I know he is still out.

Senator Choquette: Only one person at a time can get the number, unless it is amplified such as with the outfit you have here. Only one person at a time could listen to it.

Mr. Leigh-Smith: That is correct.

Senator Choquette: It would take a very long time to convince the whole population at that rate, especially when the line was busy, of the good cause they are advocating. While you are here perhaps we could deal with this. We are dealing with statements made in a public place. I think the whole act hinges on that. Would you say that a telephone line over which you relay a message of that sort would be a public place?

The Chairman: It is not only a public place.

Senator Choquette: You would know, Mr. Chairman.

The Chairman: No, it is not.

Senator Choquette: If it is a statement made in a public place which incites people to violence and is likely to cause a disturbance...

The Chairman: You will observe that under those circumstances the defence of truth is not available. The dissemination of hate literature not in a public place and not where it is likely to bring about riot can be met by a plea of truth. That is the distinction between the two.

Senator Prowse: Section 267B(2) says:

Every one who, by communicating statements . . .

It does not say where . . .

willfully promotes hatred or contempt against any identifiable group is guilty.

The Chairman: Gentlemen we have a big program. I suggest that you have pretty well cleared up what you wanted to say; Senator Choquette, have you not?

Senator Choquette: We could go on indefinitely with this, but I suggest we must take the word of Mr. Leigh-Smith of the Bell Telephone Company that their position is that they can hardly refuse, so the next step, I think, would be to let us hear the record.

The Chairman: Yes, let us hear the record.

Senator Prowse: Maybe he wants to add something to this.

The Chairman: If you want to add something, Mr. Leigh-Smith, by all means go ahead.

Mr. Leigh-Smith: The position of my company in this case has been questioned and I was wondering if honourable senators would do me the honour of at least letting me read into the record of this committee one or two excerpts from the tariff that govern us. They are very brief, and if they were there for your later perusal I feel they would clearly spell out our obligation. I would feel a lot happier if you would allow me to do this.

The Chairman: Is that agreed?

Hon. Senators: Agreed.

The Chairman: Go ahead, Mr. Leigh-Smith.

Mr. Leigh-Smith: Thank you. I have already mentioned section 5, subsection (3), of our act of incorporation as amended by Bill C-104 passed last year, which indicates that as a common carrier we

shall neither control the contents nor influence the meaning or purpose of the message emitted, transmitted or received as aforesaid.

Section 2 of the second year of Edward VII, 1902, chapter 41 says:

Upon the application of any person, firm or corporation within the city, town or village or other territory within which a general service is given and where a telephone is required for any lawful purpose,

the company shall with all reasonable despatch furnish telephones ectetera,

indicating the mandatory nature of our obligation as a public utility.

The third item I would like to submit is that we have general regulations governing the telephone company which are, of course, provided by the Canadian Transport Commission and they fall under the Railway Act, and have been published and have the force of law in the *Canada Gazette*. An excerpt of Rule 2 (A) of these regulations which have the force of law reads as follows:

Telephone service and equipment offered by the company's tariffs, when provided by the company, shall be furnished upon and subject to the terms and conditions contained in (I) these regulations, (II) all the applicable tariffs of the company, and (III) the written application (if any) to the extent that it is not inconsistent with these regulations or said tariffs, all of which shall be binding on the company and its customers.

Once again, a clear statement and we have no alternative, I should say, but to give service on demand without respect to the purpose for which it is to be used.

Rule 3:

The company does not transmit messages, but merely provided the service and equipment which enable those entitled to do so.

Once again, we cannot influence the content of the message. Rule 20:

The use of the company's service or equipment for annoying any person and the use of offensive language while using or conversing over the company's equipment are prohibited.

I read this one because I think, honourable senators, that it will raise questions in your minds, the use of offensive language. Surely we must ask ourselves if anything is offensive, that this language is offensive. Yet, it is not the language or the choice of words which is offensive, it is the message which is offensive, thus if it were couched in profane or obscene language, we would clearly have a legal stand that we could take within the law, but because it is not couched in obscene or profane language the language itself cannot be termed offensive. Now, there are others, but I would simply like to mention some

excerpts and they are very short. These are in the Criminal Code which we felt were applicable to our position in this respect.

Senator Walker: What is the section where offensive language is prohibited?

Senator Croll: Twenty-one, I think.

Mr. Leigh-Smith: Rule 20 of the General Regulations.

Senator Croll: What you are saying, as I understand it, is if this fellow had been so thoughtless as to use a four-letter word you would have thrown him off the air.

Mr. Leigh-Smith: Yes, sir.

Senator Croll: But anything short of that goes. You hold out as the great public service. Go ahead. My regret is that I am on your side today. I regret it very much, because we are both in the same camp, but I do not like what you did.

Mr. Leigh-Smith: I think, sir, that you will recognize that this man, although he may be malicious, is perhaps not stupid, and for this reason he did not use any four-letter words. If we had cut him off he would then have gotten a great deal of publicity and rephrased his statement to avoid four-letter words and get back on the air again. Nothing would be accomplished by these childish practices. We recognize it. Now, the Criminal Code section 315(1):

Every one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio, or otherwise, information that he knows is false is guilty of an indictable offence and is liable to imprisonment for two years.

I am sure you are more familiar with this than we are.

The Chairman: That points to an individual, not a group, and it says so.

Mr. Leigh-Smith: It points to any person here and this message was carried over a line which would be presumably to one person at a time.

Senator Haig: You are getting us very close to wanting to hear that message.

Mr. Leigh-Smith: I have just two more excerpts and they are very short. Paragraph 2 of section 315 as follows:

Everyone who, with intent to alarm or annoy any person, makes any indecent telephone call to such person is guilty of an offence punishable on summary conviction.

We look at that and we have got them. It certainly cannot be qualified as indecent. He is not making the telephone call; you are when you are calling him. If you are offended it is because you have chosen to make the telephone call, and therefore once again, he was not making a telephone call; he was not initiating the contact.

Senator Walker: That could easily be amended, too.

Mr. Leigh-Smith: Yes. I hope it will be. Section 316(1):

Everyone commits an offence who by letter, telegram, telephone, cable, radio, or otherwise, knowingly utters, conveys or causes any person to receive a threat.

And when that threat is specifically to cause death or injury to any person. We looked at this possibility of taking action and I am mentioning this, sir, because I wish I could say that we had really felt that in serving the cause that we want to serve we could have taken positive and helpful action. I understand and feel for your criticism which you wish to level to my company, but I can assure you we did not do it and the action we took was based on a feeling, and I can assure you again, of frustration and of a deep wish to try and understand...

Senator Walker: Did you ever try the simple expedient by asking that the Criminal Code should be amended to include what you are saying you have not got?

The Chairman: That is before us.

Mr. Leigh-Smith: We have had contact with the Department of Justice since this came and since this message started to appear on our lines, explaining the dilemma in which we found ourselves and suggesting the legislation that would permit us to take action. This has been done.

Senator Haig: When this man applied for your service did you know what he was going to do?

Mr. Leigh-Smith: No.

Senator Choquette: He was known all over Toronto as a self-appointed Hitler or Nazi leader. Surely you must have known what Beattie wanted to do. He was not advocating that one should make his first communion before the age of six or seven years. You must have known what it was about.

Mr. Leigh-Smith: Sir, I respectfully suggest that if he had told us that he wanted to give such a message our position would have had to have been to believe him. If he had put such a message on the line for one week and then changed it to a different type of message, to object at that point would be to censure the contact and we had no control.

The Chairman: I think we have gone far enough. I know the senators are all anxious to hear this record.

Mr. Leigh-Smith: I am indeed. The quality is appalling, which perhaps is not a bad thing.

The Chairman: If we could have the text in addition to the tape. (*Tape recorder turned on.*) I will ask the witness to read that section we were listening to, or trying to listen to, and then to give us the excerpts only. We have not time to listen to the whole speech on each occasion, but that portion of the speech which seems to be appropriate, shall I say.

Senator Haig: May I ask why Bell Canada took recordings of these announcements, from these messages by this man?

The Chairman: They did, but it has not been very successful. Now, let us hurry. Let us ask the witness to read those portions which are applicable to what we are considering, that is, the offensive parts of them, not the whole speech.

Senator Prowse: Mr. Chairman, pardon me, may that be done but subject to this, that the committee will then decide, when they have heard it, whether they wish it to be part of the record.

The Chairman: The reporters will not take it down in the meantime.

Senator Croll: Let us hear it first. I do not think we are bound to give it this amount of transmission and advertising. Let us hear what it is.

The Chairman: Go ahead, witness.

Mr. Leigh-Smith: I am reading the portions of the message which Senator Roebuck has underlined. These represent excerpts.

(Excerpt read from message which ran from November 30 to December 7, 1968.)

(Excerpt read from message which ran from December 8 to December 18, 1968.)

I cannot imagine, Mr. Chairman, anyone listening to the whole message.

Senator Prowse: Let us hear the statement.

(Excerpt continued, and further excerpts read.)

The Chairman: Honourable senators, we have heard excerpts from a certain recording made in Toronto which have been read by Mr. Leigh-Smith. Is it agreed that this part of Mr. Leigh-Smith's testimony be not included as part of our official record because of their defamatory and disgusting character.

Hon. Senators: Agreed.

The Chairman: Thank you, Mr. Leigh-Smith. You have performed a real service in coming here.

Now, honourable senators, we have a delegation from an important organization in Canada, the Canadian Jewish Congress. Some of us have heard them previously, before another committee, but I do not think they will be as long this time.

I think I had better introduce the members of the delegation one at a time, as the occasion arises. The first to address us will be Mr. Monroe Abbey, Q.C., President of the Canadian Jewish Congress, from Montreal. Mr. Abbey, will you address the meeting?

Mr. Monroe Abbey, Q.C., President Canadian Jewish Congress: Senator Roebuck, honourable senators: in order that you may be appraised of the gentlemen who are with me, I would like to take this opportunity to state that there are with me Saul Hayes, Q.C., the Executive Vice-President of the Canadian Jewish Congress; Louis Herman, Q.C., Chairman of the Joint Community Relations Committee of the Canadian Jewish Congress and the B'nai Brith; Ben Keyfetz, Executive Director of the Joint Community Relations Committee; J. C. Horowitz, Q.C., Acting President of Vaad Hair, the Jewish Community Council of the City of Ottawa, his colleagues of this council and well-known members of the Jewish community, Hyman Hochberg, its Executive Director; and Sol Litman, the Executive Director of the Anti-Defamation League of B'nai Brith in Canada.

With your permission, Mr. Chairman, I would like Mr. Herman to indicate a few examples of what is going on, prior to my reading the brief.

Mr. Louis Herman, Q.C., Chairman of the Joint Community Relations Committee of the Canadian Jewish Congress and B'nai Brith: Mr. Chairman, honourable senators, may I address you for a few moments on just what is hate propaganda and what is this problem which we have to meet, because we propose to submit to you that it is not just an incidental nuisance with which the Canadian people have to deal, but that it is a serious problem that has caused a great deal of misery and suffering and loss of lives in the past, and that it is a problem that is immediate. I may suggest that the immediacy of the problem could not have been better brought out than by what was brought out by the gentleman who preceded me for the Bell Telephone Company, because he gave broadcasts to you that brought the matter right up to date, that were made in this month of February.

May I suggest to you, in dealing with hate propaganda, that we consider just what propaganda is. "Propaganda" has been defined in the *Encyclopedia Britannica* as the making of deliberately one-sided statements to a mass audience. It is not a complicated definition—the making of deliberately one-sided statements to a mass audience.

The great historical example of hate propaganda, of course, was Adolf Hitler in his development of what he called the big lie technique. By the way, his was the first government that had a department or ministry of propaganda, and they developed a technique by which they believed that no matter how ridiculous or how outrageous was a lie, if you repeated it often enough you would get some people to believe it. We want to suggest to you that, outrageous as some of these things are, there is no argument—and these arguments will not appeal to you or me—but that for the ordinary person in the street, if repeated over and over again it does have an effect. I think the outstanding example of this was, for those of you who have read *The Rise and Fall of the Third Reich*, you will recall that William Shirer described the exact manner in which decent-minded people in Germany in the forties were taken over by the constant repetition of this type of propaganda,

and it is designed to make you hate some section of our society.

We find in the 1963 edition of the *Encyclopedia Britannica* this sentence:

If ritual murder was the most vicious propaganda, the Protocols of the Elders of Zion is the most widespread and most distributed.

The ritual murder propaganda is the story that the Jewish people kill Christian virgins for the purpose of taking their blood and making unleavened bread out of it. Of course, it chose to ignore the fact that it is completely untrue and that according to our religion we are not permitted to eat anything with blood in it, but it goes on and repeats that statement that we kill young Christian girls to get their blood to make unleavened bread.

You may say, "Now, that is ridiculous. Nobody would believe that." But I can tell you that there have been lives lost because people were accused of that sort of thing. There was the Mendel Beiliss case in Russia, the well-known case in Hungary, and Leo Frank in 1914 in Atlanta, Georgia. And there have been examples of that kind of propaganda in the last two or three years in University College, Toronto, still repeating that over and over again.

An example of the way it can be begun is contained in a quotation from the *Oxford and Cambridge Review*, page 239. I forget the actual edition, but it was a publication of the Anglican church or the High Church of England, which read as follows:

...it is absolutely certain that Orthodox Judaism—nay, Judaism as a whole—stands free from even the slightest suspicion of blood-guiltiness; but to say that is not to say that no Jewish sect exists which practices ritual murder—We do not know where the truth lies, and we are sure that widely-signed popular protests are not a good way of eliciting the truth.

It is of course impossible to disprove the existence of a Jewish sect that practices ritual murder; it is also impossible to disprove that ritual murder has never been practiced secretly by the Kiwanians or the Daughters of the American Revolution.

Of course, it is a ridiculous thing, and no reasonable and sensible person would be taken in by it. However, by constant repeti-

tion that is the most vicious sort of propaganda ever issued.

The most widespread is the *Protocols of the Learned Elders of Zion*, which purports to be the true story of a group of Jews and Freemasons who met in the 1870's to plan world conspiracy by which they would take over control of the Christian world. It has been proved over and over again that these *Protocols* are complete and absolute forgeries and, as a matter of fact, if you read the history of the *Protocols of the Learned Elders of Zion* you will find that it was adapted from the story of a group of Russians who were in hell. It was the story entitled *Dialogues in Hell*, and they were plotting to take over the world. In 1890, when it was popular to be anti-Masonic, it was a conspiracy of Masonic organizations in the latter part of the nineteenth century, but then it became an alleged conspiracy of the Jewish people.

I have in my hand an issue of the *Canadian Intelligence Service* of February, 1969, which advertises a meeting in Vancouver to be addressed by Eric D. Butler. Eric Butler is the author of a book called *The International Jew* which repeats and repeats and repeats this vicious lie about the *Protocols of the Elders of Zion*, and tries to tie it in with the so-called present Zionist conspiracy.

Those two outstanding lies—and they are lies—are being repeated today. They were repeated in some of those broadcasts over the telephone line that you have heard. I am referring to this idea of the Zionists taking over world control. Those lies are being repeated every day. I do not intend to take up the time of this committee by giving examples of the manner in which they are repeated, but let me tell you that they are being repeated. We were very concerned during the summer months of last year, when this kind of literature was distributed on the streets of London, Ontario, by a man named Wiche. This also happened in Allan Gardens in Toronto. We are constantly getting letters from other cities. I have one here from Montreal, and I have one here from Vancouver dated February 11, 1969. They contain a similar type of garbage, and I do not want to burden the committee with it. I have here any number of examples, but I do not want to put them on the record.

I know that honourable senators know the organization I represent, and some senators know me personally and know that I would

not misrepresent this. We have untold examples. Letters are being distributed in February, 1969. This is a serious matter. It has caused untold suffering in the past. We hope it will be stopped, and that people will not be caused untold suffering in the future.

That is all I propose to say at this time. May I take the liberty of turning the representation over to my colleague on this committee Mr. Monroe Abbey, The President of the Canadian Jewish Congress, who will submit to you our brief on the legal implications of the proposed legislation.

The Chairman: Thank you Mr. Herman. Mr. Abbey?

Mr. Abbey: Mr. Chairman, I believe copies of the brief have been distributed, but in order that the record may be clear I would like, with your permission, to read it.

Senator Haig: Perhaps, in order to avoid delay, this brief could be printed as an appendix to the report of our proceedings today.

The Chairman: It is only five minutes past three, senator, and we have only this witness and one more.

Mr. Abbey: Honourable senators: We are here on behalf of the Canadian Jewish Congress, the representative body of the Canadian Jewish community. Since 1919 the Canadian Jewish Congress has been the recognized spokesman of Canadian Jewry on communal and public affairs and has been acknowledged as such at all government levels. In the field of community relations the Congress works in cooperation with B'nai B'rith of Canada through a joint committee.

You are meeting to consider Bill S-21 dealing with the problem of what has been called "hate propaganda". This matter has been before the government since early in 1964 when we appeared as a delegation before the late Hon. Guy Favreau as Minister of Justice. Eleven years before that date—on March 3, 1953—we appeared for a similar purpose before the House of Commons Special Committee on the Revision of the Criminal Code with Mr. Justice Bora Laskin, professor of Law as he was then, as head of our deputation. We mention this to point out that our interest in this problem is of long standing and does not spring from the more sensational aspects of hatemongering that have appeared in the last five or six years.

We were here a year ago—almost to the day—speaking to a Special Senate Committee on the Criminal Code and were hopeful then that the legislation would be enacted before the session's end. However, a general election intervened and we now find ourselves before a new committee, some of whose members heard us on the previous occasion.

The legislation encompassed in this bill springs from a special committee set up by the late Guy Favreau, then Minister of Justice, in January 1965, to enquire into the problem and recommend the most effective way of dealing with it. This committee consisted of seven distinguished men who were well fitted by their background and experience to examine this question. Professor Maxwell Cohen, Dean of the McGill University Law School was Chairman. The other members were: Dr. J. A. Corry, the Principal of Queen's University in Kingston, whose own field of teaching is political science and law; Abbé Gerard Dion, a sociologist teaching at Laval University in Quebec, whose views on social issues are known throughout Canada; Mr. Saul Hayes, Q.C. of Montreal, executive vice-president of the Canadian Jewish Congress; Dr. Mark R. MacGuigan, a mariner by birth, and Dean of Law at the University of Windsor, is now a member of Parliament, and who at the time he served on the committee was president of the Canadian Civil Liberties Association; Mr. Shane MacKay, who was then executive editor of the *Manitoba Free Press*; and the Honourable Pierre-Elliott Trudeau, then professor of law at the University of Montreal.

The members of this Special Committee on Hate Propaganda were men who, from their profession and experience whether sociologist, political theorist, lawyer or journalist, were persons with a personal and vocational stake in freedom of the press and of expression and who had reason to be vigilant about any measure that would diminish or curtail this freedom.

This body of men composed, we repeat, of persons dedicated to our tradition of free speech and civil liberties and having examined in detail the evidence, some of which you have seen and which you will find permanently embodied in their report, determined unanimously that the protection of individuals as members of groups in our society required the enactment of legislation to

curb the spreading of racial and religious hatred.

Their conclusions were:

that freedom of speech is not an unqualified right; that the law has exerted a role in balancing conflicting interests; that in this delicate balancing, preference must always be given to freedom of speech rather than to legal prohibitions directed at abuses of it; the legal markings of the borderline areas should be such as to permit liberty even at the cost of occasional licence;

that at the point that liberty becomes licence and "colours the quality of liberty itself with an unacceptable stain the social preference must move from freedom to regulation to preserve the very system of freedom itself";

that with respect to the offence of genocide or its advocacy no social interest whatever exists in allowing the promotion of violence even at the highest level of abstract discussion: "the act is wrong absolutely, i.e. in all circumstances, degrees, times and ways";

that the distribution of hate propaganda reported in all parts of Canada is a serious problem;

that this material can not in any sense be classed as sincere, honest discussion contributing to legitimate debate, in good faith about public issues in Canada;

that given a certain set of socio-economic circumstances, public susceptibility to such material might increase significantly and that its potential psychological and social damage "both to desensitized majority and to sensitive minority groups is incalculable";

that our Canadian law is "clearly... inadequate" with respect to the intimidation and threatened violence against groups and "wholly lacking" and "anachronistic" in the control of group defamation;

Finally:

that the interest of our society requires legislation curbing such excesses and that appropriate legislation would constitute a needed control over excesses of speech and not an infringement of freedom and speech.

These conclusions were reached after many months of factual study, discussion and

examination, and having regard to the many conflicting interests involved in any examination of such a problem.

Dealing with the question of incitement of hatred which leads to a disturbance of the peace, the committee stated that:

To our minds the social interest in public order is so great that no one who occasions a breach of the peace, whether or not he directly intended it, should escape criminal liability where the breach of the peace is reasonably foreseeable, i.e. likely.

The requirements are that these statements must be made in a "public place", they must create "hatred and contempt" against a racial, religious or ethnic group and they must be likely to lead to a breach of the peace. These provisions, the committee feels, will fully protect all legitimate discussion.

With respect to extending the protection against defamation enjoyed by the individual to the group the committee finds that:

there is needed a criminal remedy for group defamation that would prohibit the making of oral or written statements or of any kind of representations which promote hatred or contempt against any identifiable group. Identifiable group we propose to define as any section of the public distinguished by religion, colour, race, language, or ethnic or national origin.

This report states further that:

We are convinced that the evidence justifies this policy judgment and that in our present stage of social development the law must begin to take account of the subtler sources of civil discord.

The committee report then discusses the safeguards it feels should be written into a law of this kind, and goes on to say:

The history of law and opinion as concurrent developments is replete with instances... not only where law reflected the state of opinion but where a fluid opinion was itself crystallized by law. This generation of Canadians is more sensitive to the dangers of prejudice and vicious utterances than ever before. Such public opinion, therefore, should now be prepared to crystallize these sensitivities, fears and doubts into positive statements of self-protecting policy—namely statements of law.

We shall return to the content of the report of the special committee.

Let us now turn for a moment to another jurisdiction and deal with the British experience. Frequently in public discussion of this question references are made to "Speakers' Corner" in London's Hyde Park where, it is stated, any person could rise and speak his piece on any theme, subject to no restriction whatsoever. What are the facts on Hyde Park?

Senator Urquhart: Perhaps the speaker might be allowed to sit down. He is only at page 5 and there are 22 pages. If he remains standing he will be exhausted by the time he gets to page 22.

The Chairman: Would you like to sit down?

Mr. Abbey: Yes, Mr. Chairman. I thank the honourable senator for his consideration. (*Reading*)

Great Britain is rightly regarded as the source and fountainhead of our traditional freedoms. The inviolability of British civil freedoms has always been the envy of other lands and political systems. Great Britain, recognizing the need for the balancing of the same conflicting interests, has after considerable debate and discussion enacted a Race Relations Act. This Race Relations Act not only bans discrimination—something nine out of ten Canadian provinces already have undertaken—but outlaws the defamation of racial and ethnic groups. And the British law, we might add, does not possess the protective safeguards that are written into the bill before your committee.

The Race Relations Act of the United Kingdom has been in force since October, 1965, and has been invoked several times. On a recent occasion it was used to restrain the call to violence against the white majority element by a leader of what has been called the Black Nationalist movement. There has been no complaint editorially by the ever-vigilant British press or by the legal profession that has come to our attention—and we have followed affairs there rather closely—and no evidence that the fibre of British parliamentary democracy is any the weaker. On the contrary, it has emerged reinforced and sounder.

It should be clear that many people labour under a misapprehension with regard to Hyde Park. Hyde Park is, of course, not immune

from the provisions of the Race Relations Act. Speeches given there are as much subject to the law of the land as those given elsewhere. Great Britain has recognized the need for group protection of this kind. We with our more varied population make-up have even more reason to do so.

Now let us deal with the psychological and psychiatric aspects. Under this heading our presentation is based on the evidence offered by two outstanding studies. The first is the "Social Psychological Analysis of Hate Propaganda" done by Dr. Harry Kaufman (formerly Associate Professor of Psychology at the University of Toronto, now on the faculty of Hunter College in the City University of New York), appearing as Appendix II of the report of the special committee.

It is generally agreed that law has a duty to secure the integrity of citizenship and of citizens. In respect to racial and religious discrimination this obligation is not so much directed at punishing the person who practises discrimination but at underlining the principle of equality of citizenship. Groups of people must not be denigrated. It is the proper function of law to insure the fair treatment of citizens. This is the principle underlying the human rights laws, and the anti-discrimination laws of Canada and of eight of our provinces going back to the first enactment in Ontario in 1944 of a law which forbade the display of placards indicating racial or religious discrimination.

Professor Kaufmann's study is concerned with the communicators of hate propaganda, its recipients and the target group. His study confirms that such propaganda can gain and has gained acceptance and compliance, that

...recipients will be receptive to hate literature to the extent that they believe themselves to be threatened and consider action open to them which can eliminate this threat.

As for the target group, he states:

Through no fault of his own, a member of society is being degraded and humiliated. He is on guard against the insults, the sarcasm, the cruel humour accorded to his group.

He concludes by saying:

The writer is not competent to judge the possible legal side effects of legislations applicable to the problem at hand, but has considerable evidence of the undesir-

able effects of hostility-generating propaganda, both upon potential converts and targets.

Dealing further with the possible effects of legislation, he says it may create

a reassuring knowledge to targets and potential victims that they enjoy the clear protection of society not only against physical attack or individual calumny, but also against the threats and vilification directed against them as members of a religious, ethnic, racial, or other group. It is quite likely that such a reassurance through legislation would go a long way toward removing motives for unregulated self-protection.

We occasionally hear the comment that the hate material circulated is so childish and unbelievable that it would incite hatred and contempt for its authors rather than the persons against whom it is directed.

We are quite prepared to concede that this is the reaction of many normal people. If we are not living in a period when the world saw the planned extermination of an entire people preparatory to the destruction of other European people and races—an event which happened only yesterday and whose survivors are living amongst us—we would be quite prepared to accept this apparently "normal" reaction to the extremities and absurdities of hate propaganda. But we know that these things did happen. Despite the apparent juvenile and self-evident absurdity of the propaganda an entire death machine functioned in Europe in the 1940s which carried out a literal implementation of the threats of hate propaganda.

In 1967 a volume appeared entitled *War-rant for Genocide* by Norman Cohn, Director of the Centre of Research in Collective Psychopathology of the University of Sussex. Professor Cohn's book is an extended analysis of the growth and expansion of the myth of a world-wide Jewish conspiracy. We cannot hope within the limitations of our submission to give even a rough abridgment of its contents, but recommend it to the attention of the honourable senators. Suffice it to say that it is an exposition of how a myth—a demonstrably false myth, and one that maligns an entire people—can take hold of the credibilities of wide masses to the extent that it helped prepare the atmosphere and climate for the genocide of World War II. The internal

inconsistencies and contradictions of this libel—in Russia the propaganda pictured the nefarious plotters as allied with the Germans, in Germany as joined with Britain and France, and in Britain as linked with Russia and Germany—in no way inhibited its spread and acceptance.

This material, specifically the forgery known as *The Protocols of the Elders of Zion* is no stranger to this country and to this continent, and is still in circulation.

We commend Dr. Cohn's book to your study as the examination of a clinical case of the distribution of material that is false and maligns and directs hatred and contempt against a religious group. Neither its evident absurdity nor its extremes of fantasy prevented it from becoming a powerful motivating force and accessory to widespread destruction and bloodshed.

That the implications of this propaganda is related to its nature rather than to its volume is suggested by a finding of the special committee.

The amount of hate propaganda presently being disseminated and its measurable effects probably are not sufficient to justify a description of the problem as one of crisis or near crisis proportions. Nevertheless the problem is a serious one. We believe that, given a certain set of socio-economic circumstances, such as a deepening of the emotional tensions or the setting in of a severe business recession, public susceptibility might well increase significantly. Moreover, the potential psychological and social damage of hate propaganda, both to a desensitized majority and to sensitive minority target groups, is incalculable. As Mr. Justice Jackson of the United States Supreme Court wrote in *Beauharnais v. Illinois*, such sinister abuses of our freedom of expression—can tear apart a society, brutalize its dominant elements, and persecute even to extermination, its minorities.

The committee is warning here that it is not quantity that is important in the spreading of hate propaganda but the danger that such material by providing a breeding ground might create a deterioration of the atmosphere, a deterioration whose consequences we have seen.

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In this connection we have a third document that is directly relevant. Less than two years ago a psychiatric report prepared for use in the Ontario Court of Appeal was provided by way of affidavit by a Toronto psychiatrist in the case of a resident of that city facing a charge of assault occasioning bodily harm which arose from one of the incidents in Allan Gardens precipitated by a neo-Nazi agitator. The appeal was taken against a prison sentence, the accused having pleaded guilty. The appeal, we may add, was successful.

Having recounted in this psychiatric report the personal history of the defendant during the Nazi holocaust, the imprisonment, the torture, the personal brutality and beating, the planned starvation and the annihilation of his family, the report then deals with the events at Allan Gardens in the summer of 1965.

On May 30, 1965, one of his friends invited him to come along to Allan Gardens where a Nazi demonstration was scheduled. He could not believe that such a thing was possible and he went along to the meeting place, partly out of curiosity and partly to express his opposition to a revival of the dreaded past. He was shaken up by the horrible idea that his children might lose their lives in a Nazi crematorium which he had seen in function while in concentration camps. At the sight of the Nazis with their swastikas, the assembled crowd started shouting and running towards them. Suddenly he felt hot and feverish and everything was boiling inside him and he was unable to control himself when he became part of the fighting mob. When taken to the police station his mind went blank and he was unable to think of anything but of his family.

The psychiatrist goes on to say the following:

As a result of my studies and my experience in practice, and my interview with Mr. D-, it is my opinion in regard to him that, (a) Mr. D- is one of those survivors of the Nazi holocaust who have tried to bury the unfortunate past by adjusting themselves to the society of their choice which was helpful in the process of repressing the past to a considerable degree. His hate against his criminal tortures was never allowed to find an outlet, neither during the years of persecution

nor following the Nazi empire's breakdown. However, it was sufficiently securely repressed and chances are that it would never have come to the fore without the provocation of a public Nazi demonstration. The latter may appear childish, silly and ridiculous to the majority of people who were not directly afflicted by the Nazi atrocities. On the other hand to a person who has been a personal victim of these atrocities with all their consequences to himself and to his beloved ones, a demonstration must evoke the most profound fears leading to a loss of control which would be unthinkable under any other circumstances. To this person it means the most horrible threat of an imminent or already existing revival of the past, threatening his very existence and possibly destruction of his family. It is well known that this type of experienced threat, although irrational in the eyes of the unbiased observer, is apt to create a state of panic with short circuit reaction, loss of control and violence. This process is much more likely to occur in a group than when the person is confronted with this situation as an individual.

There is much more in the psychiatrist's analysis and we append it herewith.

The Law as Public Policy:

In the 1940s and to some extent in the 1950s in the effort for fair employment and fair housing legislation we found ourselves immersed in the debate as to whether education or legislation were more effective instruments in coping with the social problem of racial and religious discrimination. Time has fortunately resolved that debate. The experience with such laws in Canada since 1951 has established, as we argued then, that the two instrumentalities must accompany each other—and that legislation is itself an extremely effective form of education. The existence of these laws, public knowledge of them and their enforcement are acts which are themselves educative in nature, and which reflect public policy as enunciated by government.

The bill before us deals with a question on which the government cannot be neutral any more, as is now recognized, than it can be neutral on racial and religious discrimination in employment and housing. It will stand as a

formulation of public policy expressing the wish and goal of this nation as represented by its Parliament.

The Need for Legislation:

In confirmation of our position on the need for effective legislation we cannot better underline our view than to cite to this committee the very cogent words of Chief Justice Gale of the Ontario Supreme Court, who addressed the York County Law Association in Toronto in the following words in part:

"As you know, all criminal law involves a balancing of the rights of the individual on the one hand, and the rights of society on the other. Our Criminal Code is a statement of the rules which have evolved to place limits on the freedom of action of every individual so as to safeguard the basic rights and freedoms of all individuals...

Let me give a very simple illustration of the problem involved. Freedom of speech is a time-honoured liberty in Western legal systems, and has now been made a part of the Canadian Bill of Rights. But it is not, as it cannot be in any organized society, an unlimited right. The right to speak one's mind is not a licence to preach vilification and violence...

...Recently, we have all been made aware of the inability of our present legislation to curb the evil outpourings of 'hate propaganda'. The Attorney-General of Ontario has stated his view that the existing provisions of the Criminal Code cannot stop this despicable flow of speeches and writings. Certainly, here is an example of a situation where the individuals' freedom of expression must give way to the broader interests of social cohesion and racial and religious freedom...

It is my concern that too much stress has been laid upon the privileges of the individual, as an isolated person, an island unto himself, and not enough upon the duties and obligations which are his as a member of that society. In my view, it is the 'rights' of society that are experiencing a subtle but continual erosion, and individual liberty, far from diminishing, is expanding to the detriment of the collective safety and welfare.

I realize, of course, that this is not a popular position to take before a gathering of lawyers. Traditionally, and properly the role of the lawyer has been to protect the interests of the individual, and his historical rights and immunities. Such a role is no more than natural; after all, the lawyer is retained by a person or by a group of persons for that very purpose. He is trained from the first that it is not only his prerogative but his duty to keep his client out of the clutches of the law. The state, acting on behalf of the individual, defends. The whole tradition of the common law justly favours the man accused of an offence; and the first lesson law students are taught is that it is far better that one hundred guilty men go free than that one innocent man be punished for a crime he did not commit.

I do not quarrel with these principles. Indeed, I subscribe to them without reservation. However, what does concern me is that, in carrying out its time-honoured responsibilities, the legal profession is at times prone to lose sight of the public welfare. May I remind you that it is our duty to see that the interests of the community, as well as those of the individual, are recognized and protected.

The real difficulty, of course, is to maintain a proper balance between personal rights and the common welfare. To achieve anything approaching such a balance has always been a formidable task. It is destined, however, to become an even greater one unless we take care to ensure that the fundamental right of the community to protection is not dissipated by exaggerated solicitude for the immunities of its members...

My principal object this evening has been to bring to your attention the need for the legal profession to be as jealously vigilant of the public welfare as it has traditionally been of the welfare of the individual. Without question or doubt, one of the greatest principles in our criminal jurisprudence is that which ensures that a man is presumed to be innocent until he is proven guilty beyond a reasonable doubt. I wholeheartedly and sincerely subscribe to that rule. But there is another fundamental and essential

principle that operates in our criminal philosophy, and it is this: the criminal law exists not for the protection of the individual as such, but for the protection of society as a whole.

In these days I fear that too little attention is paid to this latter principle. It is our duty and responsibility—all of us engaged in the administration of justice—to ensure that it is honoured and preserved."

The Bill and its Safeguards:

The bill at present before you substantially follows the Report of the Special Committee on Hate Propaganda save in two respects. We want to emphasize that a ban on genocide or counselling genocide is by no means superfluous. It is in substantial agreement with the United Nations recommendations on this subject and it commends itself to the conscience of all civilized nations. We also want to suggest here that the anti-genocide clause be redrafted so as to apply to "identifiable groups" as the other clauses do.

The section of incitement to violence proposed in Bill S-21 under Section 267B (1) is a refinement of other provisions already included in the Criminal Code. In very large measure some of the critics of this section proceed on a preconceived notion of what it says, not having taken the trouble of reading its text. The taking of an action likely to lead to a breach of the peace is a criterion known in the criminal law. Under this section it is not what is said that is crucial but whether it is linked with a breach of the peace—a situation, as stated, familiar to our law.

The report of the special committee throws light on the need for this section:

"...It is readily apparent that it should be unlawful to arouse citizens deliberately to violence against an identifiable group, and in our understanding of Canadian law this already may be prescribed by the present rules in the Code government sedition (although this is not absolutely certain). But the social interest in the preservation of peace in the community is no less great where it may not be possible for the prosecution to prove that the speaker actually intended violence against a group, or where the wrath of the recipients is turned, not against the group assailed, but rather against the

communicator himself, and the breach of the peace takes a different form from that which he was likely to intend. In neither case, of course, do we wish to suggest that the attackers who themselves commit a breach of the peace should not be criminally liable, and there is a little doubt that they are already liable under existing criminal law. But the gap in the law today derives from the fact that it does not penalize the initiating party who incites to hatred and contempt with a likelihood of violence, whether or not intended, and whether or not violence takes place." (1)

The third provision—Section 267B (2)—deals with what is called group defamation. It is important to bear in mind the requirements of this offense:

(a) the action of promoting hatred or contempt must be wilful, i.e. a deliberate and intentional act,

(b) the statement must be untrue, and,

(c) the statement must be one which the accused did not believe on reasonable grounds to be true, or the public discussion of which would not be for the public benefit.

If a defamatory statement is deliberately made about an identifiable group with the definition of the Bill, and the person issuing this statement can show no reasonable grounds to believe it true, and if its public discussion is not for the public benefit—what possible protection is owed to such gratuitous and malignant sowing of hatred? If a person knows his tale is false and does not care a whit for the repercussions of the statement, if it has no relevance to the public interest and brings hatred and contempt upon a racial, ethnic or religious group—surely he should face the consequences of this act? The honest statement is protected while the dishonest and malicious one constitutes an offence.

These defenses in our view are safeguards that offer full protection to freedom of speech and freedom of expression. If statements are true, we are fully content that they be made without let or hindrance; if discussion of such statements is in the public interest and if it be found that the speaker or writer had reasonable grounds to believe them true, we are satisfied that there should be no interference

with them. These are defences that are already present in the Criminal Code in respect of defamatory libels and we do not quarrel with their inclusion in this legislation.

Some critics complain of the onus being on the accused to give evidence to support these defences. This is in keeping with the rules in all defamation cases, the onus being on the accused to establish the truth of his statements. Surely it is not up to the person maligned to prove that he is not guilty of the charges any opponent may dream up.

The Chairman: Well, the Court, of course, has to rule that they are defamatory statements before the defendant is called upon to defend himself.

Mr. Abbey: That is true.

(Reading)

We would like at this juncture to return to the defence of truth as mentioned earlier. There are a variety of offences known to our law involving defamation and the use of language, where the truth of the statements cannot be used as a defence. These include seditious libel, section 60 of the Criminal Code; scurrility, section 153; and obscenity, section 150. The broadcasting regulations of the Board of Broadcasting Governors which forbid the broadcasting of "any abusive comment or abusive pictorial representation on any race, religion or creed" do not contain this defence either.

By raising this we do not mean to suggest that this defence is not in place. We approve it and have said so in this submission. We are raising it to point out that this bill contains a vital safeguard which is not available as a defence in numerous other offences in our Criminal Code and Government regulations.

We wish to make an additional observation. The report of the Special Committee on Hate Propaganda and the provisions of Bill S-21 do not envisage prior censorship. This bill places no "prior restraint" upon speakers or writers. No public official or policeman has the right to ban any written material or to prevent a speaker from expressing himself. It has no quality of what is called "prior jeopardy" in American legal terminology. Only a properly constituted court of law is qualified to deal with it when charges are laid after the speech is made or the article published. The full procedural requirements must, of course, as

in all our criminal courts, be completely adhered to. Neither policeman nor magistrate can interfere in advance and forbid any actions or words. All this is left to the courts, and to the courts alone, to decide. Talk of a "gag-law" or of capricious and dictatorial banning of speakers or articles is irresponsible and unwarranted in the face of the clear provisions of the bill.

Senator Haig: That applies to Bell Canada then.

Mr. Abbey: It does, in certain matters, and it is not my position to discuss the representations of Bell Canada, but there are some of us lawyers who will not go as far as the representative of Bell Canada went in the proscriptions that he believed are placed on Bell Telephone in the various laws that presently exist, or even in their contract.

Senator Choquette: Hear, hear.

(Reading)

Mr. Abbey: We should point out to the committee the remarks of Chief Justice Wells of the Ontario High Court of Justice in a recent public address in Toronto. Chief Justice Wells said:

...when, however, it (i.e. 'international defamation which is sometimes used to the disadvantage and hurt of the Jewish people') reaches the extremes which it has done in our own experience and lives it would seem to demand something more and the power of the state must, I think, be invoked to protect any group which is subject to the vilification which has been expressed from time to time in various parts of the world...

He went on to say:

I would personally advocate the necessity of obtaining the consent of one of the Attorneys General of a province or of the Attorney General of Canada... before such charges should be proceeded with. As long ago as 1928 Chief Justice Duff, in dealing with problems not too different from the defamation of a racial minority, pointed out that already under the law, the right of public discussion is subject to legal restrictions and these he based upon considerations of decency and public order and the protection of various private and public interests, which for an example, are protected by the laws of defamation and sedition. He defined 'free-

dom of speech' by quoting some words of Lord Wright in a famous judgment where he said that 'freedom of speech is freedom governed by law.'

Chief Justice Wells also said:

...it is vitally important that when some law to regulate attacks of this sort is finally put in legislative form, it should be one which will hold the balance between fair speech and freedom of expression on the one hand, and ordinary decency on the other.

We have a question to posit on the definition of identifiable groups: The category of "religion" has been omitted from the list of descriptive qualifications.

Senator Choquette: I was going to ask you a question concerning that very point, sir. I do not wish to disturb your representation, but since we have arrived at this point, I would like to mention that I noticed in your brief that whenever you dealt with groups you defined them as including religious groups. I did not think that was included in the act.

Mr. Abbey: In our brief, sir, in order to bring it forcibly to the attention of the honourable senators, we have included in it what we believe should be put in the act in the law when it becomes law. We now endeavour to give you our reasoning why we believe religion should be included.

The Chairman: I intended to ask you the same question, but will you conclude, please, and then let us ask such questions as we wish.

Senator Prowse: Mr. Chairman, may I just ask a question on the same point? There was a reference to this earlier. I think there was a quotation from the Cohen Report which contains the full context.

Mr. Abbey: Yes. The quotations throughout have been from the Cohen Report, and in that Report religion is included.

Senator Prowse: In the definition of identifiable groups?

Mr. Abbey: Yes. That is correct. We are using the Cohen Report throughout as a partial basis of this brief of ours.

Senator Prowse: Thank you.

Mr. Abbey: And now I will continue reading from the brief:

This in our view is a serious omission. It was present in the recommendations of the report of the special committee and we can find no adequate reason for its removal. We understand the reluctance of the drafters to include religion if they had the idea that religious controversy would in some way be inhibited or constrained. This is in no way intended. Nothing in the bill in any way restrains the discussion of religious views, doctrine, dogma or conviction. It is hatred or contempt against the people who are embraced by the religious definition. Criticism of Judaism, Mormonism, Catholicism, Buddhism, Islam, or any other "ism", could not possibly come under such a provision. It is when members of such groups are subjected to hatred and contempt quite apart from their beliefs and convictions that it is felt the protection is needed. It is not enough to state that religion is something anyone can change for himself. For most of us our religious affiliation is something we are born into and which we cherish deeply, not to be shed or cast aside lightly. It is as much a part of our character, personality, and identity as our race and nationality, possibly more so. We have no objections to our religious views and practices being publicly discussed and argued, even criticized. There are a host of views held by various religions on a wide variety of subjects—all of which are constantly discussed in the public forums and which we fervently hope will continue to be discussed as long as our present political system lasts. But when charges are made, for instance, that Jews require human blood for ritual purposes, surely this kind of abusive defamation of a group should be covered in the legislation.

We appreciate that an alternative category may be provided, that some groups—the Jews for instance, perhaps the same may apply to the Mennonites—may be considered under the category of an ethnic group. We do not wish to enter into the controversy of whether the Jews are a racial group, an ethnic entity, or a religious communion.

The Chairman: It is rather important if you leave out the religious part of it.

Mr. Abbey: We go on in the brief to point out why the combination of the three is necessary and, we believe, applicable.

(Reading)

There is no doubt in our mind that a case could be made out for each of the latter two categories, neither of which excludes the other. However, the religious element is common to both. Even the so-called secularist Jew, though he may not himself subscribe to all the tenets and practices of Judaism, will concede that the Jewish religion is the historic source of Jewish values from which their ethical imperatives are derived. The most consistent and historic definition of Jewry and Jewishness, the one common to Jews of all lands, is its basic religious identification. It would be a mockery of the intention of this legislation if for flimsy pretexts the category of religion were omitted.

One explanation is that the Jewish group would be embraced in the definition of the other two categories. The other two categories, we presume, would be race and ethnic origin. We would unequivocally reject race as a category as contrary to scientific knowledge and to Jewish tradition. As for ethnic origin, as stated above, we would not deny categorically that Jews are an ethnic group. However, it is apparent that Jews themselves differ on this definition. In the censuses of 1931 and 1941 the difference between the number of Jews in Canada who were Jewish by ethnic origin and those who were Jewish by religion was less than one percent. However, in the next two decades, perhaps due to growing nativization and acculturation, the discrepancy between the two figures widened. Of the 204,836 Jews by religion in the 1951 census, 11.3% were of some other ethnic origin. Of the 254,368 Jews by religion in the 1961 census, a much higher figure of 31.9% (81,024) were reported to be of some other ethnic origin. It is apparent therefore that many—almost 32% of the Jews in this country—account themselves or are accounted to be Jewish by religion only and not by ethnic origin. The rest are content to be identified with both categories.

The Chairman: Can you give us a definition of "ethnic"? I have looked it up in the dictionary but I did not get very far.

Mr. Abbey: Perhaps my learned friend can help you.

Mr. Herman: My advice is: Don't try.

Senator Prowse: The Oxford Dictionary says it means non-Jewish.

Mr. Abbey: That may aid us in our brief. However, we have found that dictionary definitions very often from time to time do not necessarily clear up a matter, but rather add to the confusion.

(Reading)

What emerges from this is that, however they may differ on the question of ethnic origin, Jews clearly constitute a religious group. The same may well be said of other religious groups.

We respectfully suggest, therefore, that in 267B (5)(b) the word "religion" be added to "colour, race, or ethnic origin" as a means of identification.

Wide Support for Legislative Action:

Since 1964 when a group of hate-mongers stepped up their agitation there has been a persistent feeling by Canadians in all walks of life, from all political parties, and from a representative cross-section of their communal organizations, that the government has a responsibility in curbing this unrestricted hate dissemination. This support has not been couched in terms of specifying the precise nature of the laws needed, but it has clearly stated that legal measures should be taken. It has come via unanimous resolutions of the Manitoba and Ontario legislatures, a resolution of the Executive Committee of Metropolitan Toronto, resolutions of the Canadian Federation of Mayors and Municipalities and the parallel Ontario organization, the City Council of London, Ontario and the East Nova Scotia Mayors' Association. Three barristers' organizations—the Canadian Bar Association, the York County Law Association, and the Manitoba Bar Association—have passed similar resolutions. The Canadian Baptist Federation sent a wire to the Prime Minister asking for remedial action. The Rev. James Mutchmor, speaking in Winnipeg as Moderator of the United Church of Canada spoke similarly, as did the Anglican Bishop of Toronto. The National Council of Women of Canada and the Canadian Legion, assembled in convention, expressed the desire for such measures, as did several local Rotary and Kiwanis groups.

These spontaneous expressions reflect a groundswell of opinion across Canada that a curb be placed on the gratuitous and deliberate dissemination of hatred against racial and religious groups.

Telephone Messages:

Within the last several months a situation has arisen in the Toronto area which is squarely in the purview of this committee. A local hate-monger has rented a code-a-phone service from the Bell Canada firm. This enables him to convey taped messages that vilify racial and religious groups such as Negroes and Jews on an ongoing 24 hour a day basis. There has been concerted public and private protest to the telephone company but Bell Canada takes the position that they cannot act until there is a clear Federal legislation of the kind contemplated in Bill S-21. This entire episode, which is still going on—the messages are changed weekly—is a valid example of hate-mongering being carried on overtly and blatantly, using the facilities of a public utility and spreading false and defamatory stories vilifying racial and religious groups. This is a clear case where legislation is called for.

I heard one of the honourable senators ask whether there had been any advertisements in connection with this program. I have been advised that there has been publicity in connection with these programs. I have also been advised that there has been a series of persons called harum-scarum, without any special means, by telephone calls to subscribers in the Bell Telephone directory suggesting to them that if they want to hear a message of importance they should call the number indicated.

Senator Choquette: We have been told that the line was busy all the time because a receiver had been lifted.

Senator Croll: Do not be misled by that. They have an easy way of getting round that. When that is done they immediately call the telephone company and say the line is out of order, and they put it in order quickly. He was kidding you about that. I can tell you that.

Senator Choquette: That comes from Smith.

Senator Croll: It came from Smith but Croll is correcting him.

(Reading)

We appear before you today in support of the legislation embodied in Bill S-21, which we feel, subject to the comments we have made in several respects, is on the whole wisely conceived and drafted. The danger of

hate propaganda, as has been stated, lies not in its quantity or volume but in its intrinsic quality, a quality which undermines the climate of our public life. Having said this, we nevertheless state that there has really not been a serious abatement in the currency and distribution of this propaganda.

Mr. Louis Herman made reference to the fact that even at the present time such propaganda is in the mail. Representations have been made to the Honourable Mr. Kierans in connection therewith, and examples of such hate literature have been sent to him.

(Reading)

Recently such leaflets were distributed in London, Ontario, notice of which was sent to the office of the Attorney General of Canada. Within the past year the City of Winnipeg was plagued by the persistent smearing of hate slogans. Material continues to enter Canada freely from abroad. The time to enact such legislation is now. A measure passed in this session would establish that Canada feels strongly enough about its democratic values and the integrity of the spoken and written word to take a positive step to protect these values.

We have summarized the findings of the special committee basically that legislation curbing incitement to violence and hate propaganda is called for. We have mentioned the example of Great Britain, where similar legislation was introduced in recent years. We have referred to the disturbing psychological and psychiatric implications of hate propaganda, citing three significant documents: the study by Dr. Harry Kaufmann as embodied in the report of the special committee; "Warrant for Genocide", a book by a noted British psychologist on the myth of the world conspiracy, and how this myth gained acceptance, and a psychiatric report on a survivor of the death camps presented to the Ontario Court of Appeal. We have dealt with the safeguards the legal draughtsmen have written into the bill to ensure protection of freedom of speech, and have shown that the defence of truth is available in this bill though it is not present as a defence in a number of other allied offences. We have established that this proposed legislation does not permit any prior censorship of speech or writing. We have entered a strong plea for the inclusion of religion as a quality of an identifiable group.

We have listed the number of professional communal and political organizations who have asked for the law to intervene in this vital area of human relations.

We urge you, honourable senators, to give this bill your scrutiny and attention, for we are optimistic that a close examination of its measures will reveal the positive benefits that will flow from it. This is an opportunity to demonstrate in a practical and affirmative way that having just completed the International Year for Human Rights, Canada is serious in the defence of her democratic pattern of life and values and intends to offer these full protections in law.

We look forward with confidence to your committee commending the bill before you.

The Chairman: I congratulate you on the vigour with which you have read that entire document.

Mr. Abbey: Thank you very much.

The Chairman: We have listened with great interest to what you have read.

Mr. Abbey: With the permission of the chairman, may I suggest that Mr. Saul Hayes, the Executive Vice President of Congress, might have a word or two to speak.

The Chairman: I expected he would have something to say and would be one of the three speakers and I have great pleasure on calling upon Mr. Hayes.

Are there any questions that the honourable senators would like to ask of this witness? Senator Prowse, I think, was the first.

Senator Prowse: On page 13 in your brief you state—it is at the end of the second paragraph.

We also want to suggest here that the anti-genocide clause be redrafted so as to apply to "identifiable groups" as the other clauses do.

Why do you feel that it would be an improvement to narrow down the general provisions of present section 267A so as to limit their advocacy only to where the group falls within the defined categories.

Mr. Saul Hayes (Executive vice-president, Canadian Jewish Congress): We discovered an oversight which we believe was accidental. When you get into the matter of promoting genocide, the definition includes killing

members of a group and causing serious bodily or mental harm to members of the group. The point that is made on that expands and not restricts it.

Senator Prowse: On page 13, the last sentence in your second paragraph, just under the heading "The Bill and its Safeguards". It seems to me that "group" is wider.

The Chairman: It is any group, though. It is not a defined group. At least it is not only a group defined in the way that we have expressed it by colour and so on.

Mr. Hayes: It is pointed out by Mr. Herman that in the bill itself, on page 2, in sub-clause (5)(b) "identifiable group" means any section of the public distinguished by colour, race or ethnic origin. I am leaving out the word "religion" because I am quoting from the submitted bill, whereas at the beginning it does not harmonize with it.

Senator Prowse: It does not give any definition of "group" but merely of "identifiable group"?

Mr. Hayes: That is correct.

Senator Prowse: You feel that with the use of the word "group", without "identifiable" attached to it, it now refers to something that does not come within the ambit of the legislation.

Mr. Hayes: And it does not harmonize with the legislation in clause (5)(b) of bill S-21.

The Chairman: It is rather interesting that the United Nations document reads like this:

ARTICLE II. In the present Convention, genocide means any of the following acts committed with intent to destroy in whole or in part, a national, ethnic, racial or religious group as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Now, that is very similar to the bill before us, except that the bill before us is much wider and does not confine genocide to any group but extends it to all groups.

Senator Prowse: It could include the Toronto Maple Leafs hockey team.

Mr. Hayes: That is why, Mr. Chairman, it was meant to tidy up the phraseology. It was just to take care of the possibility suggested by Senator Prowse and to make it in full harmony with the definition, because, if you do not put "identifiable" in there, then you widen it. The word "identifiable" restricts it, but in the sense of the total philosophy of the legislation.

Senator Prowse: It keeps it so that we are dealing with the same thing and not in the sense that it is so wide that a court would feel that it did not know how to deal with it.

Mr. Hayes: That is the exact point.

The Chairman: You think it would strengthen the bill, if we were to restrict it to the "identifiable groups"?

Mr. Hayes: It is eloquence of language in order that there be no confusion as to the point. It is to keep it within the same philosophy that the bill is all about.

Senator Prowse: I see a possibility of having a good argument in which one thing is defined and another is not. It is certainly a good basis for confusion.

Senator Walker: Mr. Chairman, returning to a point made by my learned friend, Mr. Abbey, it is agreed, is it not, that all these resolutions from the various provinces, Ontario, Manitoba and so on, to which Mr. Abbey refers on page 20 of the brief, do support any Government action curbing this unrestricted hate dissemination; but it is equally true that there is no support for this draft bill as such. Have you any recommendations supporting it?

Mr. Abbey: I believe there are some.

Senator Walker: I have not seen any. As you know, we are all against hate dissemination, but with respect to the actual bill itself, has anybody, other than the Jewish Congress, supported the bill which is before the Senate today?

Mr. Abbey: I believe so, Senator Walker. I believe we can make available to you some such recommendations.

Senator Prowse: I believe, Mr. Chairman, that there may be, in the file from the last committee, letters including specific recommendations and specific letters of support in addition to the briefs we received at that time.

Mr. Abbey: I meant to say, Senator Walker, that those to which we refer referred to the bill which was before the honourable Senate previously.

The Chairman: Mr. Abbey, if you will make a memorandum of that, I will have it sent to each one of the members of the committee.

Senator Walker: Send it to the chairman.

Mr. Hayes: May I advise Senator Walker that the National Congress of Jews, the Canadian Council for Christians and Jews and the United Nations Association, all three, either have commended or propose to commend the bill in its special form—the three organizations.

Senator Prowse: My recollection is that we will find in the correspondence from last year a resolution from that group, or one of them.

The Chairman: I will have that looked up, Senator Prowse.

Mr. Hayes: We will certainly gather that together for the committee and have it sent to you. We are grateful to Senator Walker for calling that to our attention. It is an important matter.

Mr. Abbey: I would like to make two or three observations, but first I would like to make a slight correction. On page 2 we referred to Mr. MacKay as the then executive director of the *Manitoba Free Press*. Obviously, it should be the *Winnipeg Free Press*.

Senator Croll: It covers Manitoba.

Mr. Abbey: The second point is that when Mr. Herman gave his testimony he stated that he did not want to file exhibits concerning a new spate of hate literature. I talked about it with him and with Mr. Keyfitz. I think it would be in the interest of the committee if we did so file that, and I would like to leave that with the Clerk of the committee.

The Chairman: Thank you.

Mr. Hayes: Another point I wish to make starts off from the observation by Senator Walker, about the Canadian Jewish Congress being perhaps the only one, as far as he knew, which was in support of Bill S-21, or formerly Bill S-5. It is a starting off point on what I want to say.

While we must be special pleaders—and I, personally, having been a member of the original committee, could be considered as a special pleader—I want to state that the legislation we have in mind, as is obvious from its text, is legislation that we believe is for the benefit of the entire community. I would like to place on record a personal observation which almost anywhere else in Canada would be a question of privilege, that the Canadian Jewish Community would think it would be worse tactics, and of great harm to it, to try to obtain legislation affecting it alone. It would be psychologically unwise, it would be socially unwise; we would never present a bill specifically for the protection of the Jewish community. So, while we are surrogates, you might say, of the Jewish community in this matter, what we are presenting is a bill concerning the democratic interest of the Canadian community.

On page 3 of the brief you will find, in a quotation on the work of the special committee, a statement pregnant with much meaning. It refers to page 59 of the special committee's report and it says:

Given a certain set of socio-economic circumstances, public susceptibility to such material might increase significantly.

I think we have to weigh this, and I humbly suggest to honourable senators that what we are facing now in Canada, with violence in many phases of what is going on in Canada, makes it inevitable that your attention to this bill be much greater than when it was first introduced. In other words, if this special committee, which the late lamented Honourable Guy Favreau had appointed to study the problem of hate propaganda, had existed in the ambience of today, its report would have been much more vigorous, because we see today where anti-semitism in Canada is one of the minor ills facing Canada.

I would be less than fair to you if I suggested that anti-Semitism in Canada today is of such a nature that the Jews are in great peril. They are not; it is not the great peril of our time. What is important, however, is the tools of the trade, and the tools of the trade

are hate, hate propaganda. For example, right now, in the mess this continent is in in the matter of the failure to establish the proper relationships between black and white, there is an explosive situation there of a tremendous potential where the use of hate propaganda would be the chief weapon to be used.

In the case, for example, of the Indians, we are hearing every day threats that there will be violence on the part of Indians, to the effect that if they do not receive a square deal there will be great violence.

I contend, honourable senators, that the use of hate propaganda in this field will just add fuel to what may be a very big conflagration, and if we do not now have the sagacity to prepare legislation for these needs in times of turbulence that we can all foresee, I think we are all derelict in our duty.

Walter Bagehot, the great British political scientist, said that public law is always 40 years behind the times—the law should have been passed 40 years before the events which make it relevant. Now we are in a position where time does not stand that still. Forty years is eons and eons compared to the speed with which changes take place in our society daily and hourly. Who could have dreamed a few years ago of the troubles in the universities to the extent that they are now taking place?

Therefore, our submission today is really much more vigorous and, if you will forgive me for saying so—and I do not need to be presumptuous because you do not need my advice, but I feel duty-bound to make the statement that the need for legislation today is of such a character that, though some of you might have wanted to reject it out of hand three or four years ago, you may have to take a different look at it now in light of the problems we face at this moment in the society in which we live.

Senator Walker: Excuse me, is it not true though there is even less reason as far as the Jewish people are concerned than three years ago? We have not heard any propaganda against them. Isn't it so that it has died down against them?

Mr. Hayes: It is sporadic, Senator Walker. For example, recently in Montreal we, in our office, received a dozen telephone calls and, through the mails, hundreds of letters which citizens had received from the disseminators of hate propaganda. We believe a man by the

name of Zundel, who was a candidate in the Liberal Party Leadership Convention, is responsible. His candidacy lasted a day or so.

Senator Prowse: He did not get many votes though.

Mr. Hayes: No. It is that Mr. Zundel who undoubtedly sent out this barrage of mail. It is of a sporadic nature. At one time you are flooded with it, and then months go by. Four months ago there was this large quantity of literature came in, and if we got a few hundred, I can imagine the great number received by others. I might say this, that Mr. Zundel believes in psychological warfare, because, as far as I know, his addressees were members of the Jewish community. You might say that is not a demonstrable aspect of anti-Semitism, to distribute such propaganda within the Jewish community; but it is there and evidence of it does exist to a number of many hundreds we received. How many went into the wastepaper basket, we had no way of telling. It also appears in some of the examples Mr. Herman produced, which is very recent. But I will say again, honourable senators, that the incidence of anti-Semitism to the degree that I cannot sleep at night does not exist. I do not think that is the issue, however. I think the issue is that the potential is there and I think the issue is that no individual in our democratic system of governments should be in the position always of being afraid that this type of literature might escalate and become bigger and bigger in volume. While preserving the rights of free speech in a democratic system, which we believe this legislation does, we have nevertheless to take care of the possible influence of the general sphere of propaganda of hate, and not restricted only to anti-Jewish propaganda.

Senator Croll: Mr. Hayes, what you are saying, in effect, is that the War Measures Act has always been on the statute books of Canada.

Mr. Hayes: This is a good point, because during the war years it was always felt under the Defence of Canada Regulations that this type of propaganda had to be contained on the theory that the total mobilization for war effort made it necessary. Our contention is that this is a distinction without a difference; that the community of Canada must be protected in time of peace as in time of war. There seems to be little difference in the rationale of such a difference.

Senator Cook: You are saying that your further point is that while your group expects this, it can be used today against any group.

Mr. Hayes: Definitely so. I would say of the religious aspect that we have recently seen up to as late as yesterday the dangers inherent in religious hate propaganda. The events in Northern Ireland are shameful. I am sure that all the honourable senators will agree. The propaganda there is against a whole group of people or class of people, which can be identified totally by religion because they are of the same stock as the other people in Northern Ireland, and they are of the same background and the same culture. The only thing that makes them an identifiable group is their Catholicism. This is a shameful performance in a democratic society. If a bill such as this had been enacted in Northern Ireland then at least part of the situation there would have been averted.

Senator Croll: Mr. Hayes, let me say as a dues paying member of the Congress, if there is such a thing...

Mr. Hayes: I have checked my books, senator, and you are paid up.

Senator Croll: ...I would have felt better about your presentation if you had been able to point to when you had taken the same interest on behalf of the Indians.

Mr. Hayes: As a matter of fact, that is something that has been of considerable interest to the Canadian Jewish Congress, which was founded in 1919 to protect Jewish interests. I am speaking with considerable personal liberty on it because I have been a member for a long time, and I was once a member of the Executive Committee of the Canadian Eskimo Foundation, and am still a member. So my personal views do not have to be traversed. As for the Congress, it is an organization for the protection of the Jewish community, and perhaps its aims should be wider. Perhaps it should be a civil liberties society.

Up to the present time our interest is primarily, but not exclusively, in matters concerning the Jewish community. For example, there have been a number of occasions on which non-Jewish members of the Canadian community have sought our help in respect of such things as discrimination in employment. We get it all the time. We do not fail to act. On the specific question of publicly coming to the support of the Indians,

we have not done so as a Congress, but I would like to assure honourable senators, particularly Senator Croll, that we are in association with a group called the Jewish Labour Committee, and the Jewish Labour Committee and Congress are in partnership in matters affecting human rights.

One of our great battles in Pembroke and in other areas has been the defence of the Indians. In St. Thomas and other places in Ontario our own committee has for years been active in protecting human rights and civil rights for the negro population. We have been very closely concerned with the operations of the Ontario Human Rights Commission in order to give some help and assistance towards solving that particular problem. While officially we come here before you as special pleaders, as representatives of the Jewish community—pride and smugness are two great sins and I will try not to be guilty of them—at least we have a special showing in connection with our interests through various affiliations with other associations in defence of civil rights.

Senator Walker: Surely we have no hatred against the Indians. Are we not more and more sympathetic to them, and more and more sympathetic to negroes? Perhaps they have an antagonism towards us because they have been badly treated, so the shoe is on the other foot. I went to school with my friend Louis Herman, and through college with him too, and over 40 or 50 years we have known antagonism towards the Jews and hatred, but surely this has all died away. I would love to hear of some example in Canada occurring in recent years, not when he and I were at school together, which will show why legislation such as this, which is dramatic, stringent, harsh and oppressive legislation, should be passed at the present time so far as Jews are concerned, because I do not think any of us is against Indians or negroes. They may be against us, but I do not think that will upset the peace.

Mr. Abbey: I do not know if it is incorporated into the proceedings of this committee, but if you examine the proceedings of the Senate committee which sat under Senator Prowse's distinguished chairmanship last year you will find ample evidence of the amount of anti-Semitic literature.

I do not want to be misunderstood when I say it is not a traumatic experience for me. It is a traumatic experience for those who get

the material, if it is one person, one thousand or one hundred thousand. It does go on, I repeat, sporadically, sometimes in a great mass sometimes it dies down for a while and then comes up again. The material we are producing now is an indication that it does exist. The Bell Telephone statement in another indication that it exists. By the way, with considerable respect to your views, senator, we do not think the legislation is oppressive. If that is what is dividing us, we do not think it is oppressive legislation.

Senator Walker: I know you do not; I appreciate that.

Mr. Abbey: In the whole history of the nineteenth and twentieth centuries many of those in the movement for the protection of civil rights have been Jewish, and we hope that we inherit that tradition. If we did not we would lose many of our adherents. We do not think that such legislation in any jot or tittle affects the cherished rights of free assembly and free speech. As has been pointed out, what the legislation does is to say that when in the free market place of ideas someone ceases to play the rules of the democratic game, it should be stopped. If anybody chooses to have a dissertation on why the fact that the Jewish community is this, that and the other thing, in the cool use of proper phrasing in debate, this legislation fortunately will not stop it. What it is intended to stop is the vituperation and the insults from which no member of a democratic society should suffer.

Mr. Herman: Mr. Chairman, the honourable Senator Walker addressed some remarks to me. May I say that one person responsible for a change in the climate of public opinion was the honourable senator himself, who I know was chiefly responsible for the fact that the Toronto Lawyers Club now welcomes Jewish lawyers, which it did not do some time ago. I think it was of great credit to the honourable Senator Walker that he proposed a change in the by-laws. I know he fought for a number of years—and it was not easy—and he is chiefly responsible for it. Nobody has to tell me where his sentiments lie, and certainly there have been changes since the time he and I went to school, but we must examine the reasons for them. I would like to suggest, with respect, that one of the chief reasons for the present climate of public opinion is the fact that we have legislation in Ontario prohibiting the type of discrimination the honour-

able senator knows about and that I met with 30, 40 or 50 years ago. The legislation itself has not necessarily had this effect, but it has had the effect of educating the public regarding the fact that the laws of Ontario and the other provinces will not permit certain types of discrimination. Incidentally, today it was reported that Newfoundland yesterday introduced similar laws, so the attitude must be that it is contrary to public opinion to discriminate.

Similarly, in the field of hate propaganda I would suggest that the average Canadian must learn through legislation—just as he did in the field of discrimination—that the Parliament of Canada is opposed to this type of thing, and that it is incumbent upon every Canadian to be opposed to it. We are among friends here, and we certainly know that the Canadian public does not discriminate as it did, but if you want an example of what can happen because of these sporadic outbreaks, such as my learned friend Mr. Hayes mentioned, you have only to look at *Time* magazine of a month ago and the lead article relating to the struggle between the blacks and the Jews in New York City. Had someone come to me a year ago and said that there would be a great outbreak of anti-semitism in New York I would have said to that person, "You are quite crazy!" New York has half a million Jews.

Senator Choquette: Two and a half million.

Mr. Herman: Two and a half million, I am sorry.

Senator Choquette: The rest are Irish!

Mr. Herman: Two and a half million Jews. They have done very well in New York; they have laws protecting them; and certainly they have nothing to fear. Yet this type of sporadic propaganda has been broadcast on radio stations in New York and has appeared in publications. As an example, there is the one we know about in the big museum on Fifth Avenue. This is subtle, anti-semitic propaganda. *Time* magazine says it is a potential national disaster in New York. It can happen overnight and, as my learned friend Mr. Hayes pointed out, it is the very sort of thing we want to safeguard against, before anything like that happens here. God forbid that anything like that should happen in this country. I would suggest one of the best ways of safeguarding against it is to have legislation such as will make it clear, as a matter of public policy, that this country will not permit that type of hate propaganda.

The Chairman: Well, that we will not allow a basis to be laid for that kind of an outburst.

Senator Eudes: Before we adjourn, I would like to know if it would be correct to conclude by saying that this congress wants to have one additional modification made to Bill S-21, that the word "religion" be added in the proposed new section 267B(5)(b)?

Mr. Abbey: That is correct, with one addition which we pointed out before on the genocide aspect, to include the word "identifiable" in describing the group. But the main thing is the addition of the word "religion".

Senator Prowse: Those are the only two recommendations?

Mr. Abbey: Also, our recommendation is that senators vote for the passage of the bill.

The Chairman: Honourable senators, I wish to express my appreciation for this presentation. I would like to include a word of thanks to those who have come and have not appeared as speakers, who have been silent listeners. I think I could feel their influence, their unspoken influence, approving what you gentlemen have so well said. You have been clear, forceful and very impressive. On behalf of the committee, I thank you for the public spirit which you have shown in coming here and giving us the benefit of your knowledge and wisdom.

Hon. Senators: Hear, hear.

The committee adjourned.



First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA

PROCEEDINGS
OF THE
SENATE COMMITTEE
ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 3

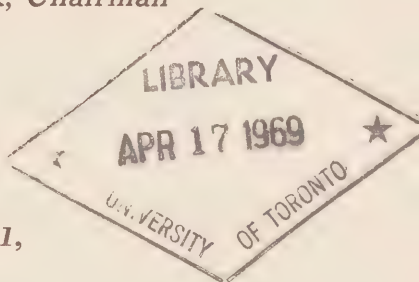
Third Proceedings on Bill S-21,
intituled:

"An Act to amend the Criminal Code".

TUESDAY, MARCH 4th, 1969

WITNESS:

Department of Justice: J. A. Scollin, Director, Criminal Law Section.



THE SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Giguère	*Martin
Aseltine	Gouin	McElman
Belisle	Grosart	Méthot
Choquette	Haig	Phillips (<i>Rigaud</i>)
Connolly (<i>Ottawa West</i>)	Hayden	Prowse
Cook	Hollett	Roebuck
Croll	Lamontagne	Thompson
Eudes	Lang	Urquhart
Everett	Langlois	Walker
Fergusson	MacDonald (<i>Cape</i>	White
*Flynn	<i>Breton</i>)	Willis

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

“The Order of the Day being read,
With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: “An Act to amend the Criminal Code”.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extract from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimbursement as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

Tuesday, March 4th, 1969.

Pursuant to adjournment and notice, the Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck, (*Chairman*), Aseltine, Belisle, Choquette, Croll, Eudes, Grosart, Haig, Hollett, Lang, MacDonald (*Cape Breton*), Prowse and Walker.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

The following witness was heard:

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice.

At 4:05 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

L. J. M. Boudreault,
Clerk of the Committee.

THE SENATE
COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
EVIDENCE

Tuesday, March 4, 1969.

The Chairman: On page 2.

The Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have just one witness today, Mr. J. A. Scollin, whom we have already heard. He is going to complete his evidence today.

Mr. Scollin, we might as well start now; the audience is yours.

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice: Thank you, Mr. Chairman.

Mr. Chairman, honourable senators, on the previous occasion when I was here, February 30, I had been indicating, by an analysis of subsection (5) of section 267B, the meanings of these standard words or phrases that are used throughout the section. We had looked at the definition of "public place," of "identifiable group" and of "statements".

Relating these to subsection 1 of section 267B, which is one of the two offences created under that section, the offence of public incitement of hatred requires the communication of statements in a public place inciting hatred or contempt against an identifiable group and in these circumstances only—that is, where such incitement is likely to lead to a breach of the peace—and the offence is punishable either on indictment or on summary conviction. You will note that there is no provision for any particular defence of, for example, belief in the truth of what was said or reasonable grounds for believing it to be true and in the public interest, and so on. There is no provision in the case of the public incitement provision for any such defence.

Subsection (2) creates the second of the two offences under section 267B. It, in fact, applies, no matter where the statement should be made, whether in public, in a public place, or in private. You will see that there the elements of the offence—and this is subsection (2) of section 267B. . .

Mr. Scollin: The offence requires these elements: firstly, communication of statements, "statements" being defined as we have dealt with already. Secondly, that this communication willfully promotes either hatred or contempt, and that such hatred or contempt is directed against, again, an identifiable group as defined in subsection (5).

Mr. Hopkins: May I ask a question? We had a phonograph record at our last sitting. I believe you were here, were you not?

Mr. Scollin: I was not here on February 25, no.

Mr. Hopkins: We had a phonograph record. . .

Senator Prowse: It was a tape recording, actually.

Mr. Hopkins: Yes, we heard a tape recording. I ask this question for purposes of elucidation as to whether the content of that tape recording, leaving aside the defences, would be a statement within the definition of "statements", and whether it would in any way be covered by sub-clause (2) of the proposed new section 267A.

Senator Prowse: Mr. Chairman, may I ask a question which follows Mr. Hopkins' question? Would it help to clarify the matter if we had a definition of the word "communicates", which is a word that has a broad, general, and rather imprecise meaning. What I am getting at is this, I might make a speech and have no communication with my audience at all. This is what I have in mind.

The Chairman: Many of us have had that experience.

Senator Prowse: Yes, is it not a dialogue but duologue, as the man said in *Time* magazine?

Mr. Scollin: I take it that this is in reference to pre-recorded messages through the telephone. . .

Senator Prowse: It does not matter. Mr. Hopkins is referring specifically to a recorded statement being

broadcast over a telephone. You dial a number and listen, and you hear this guck.

Mr. Scollin: It strikes me that the word "communicates" or "communicating" refers to a communication no matter how that communication is effected—whether it is by pure reverberations of the larynx, or whether it is a reproduction of impulses or transmission by airwaves. It strikes me that the word "communication" is broad enough in its present form to cover any form of presentation, and at the same time it strikes me that the word "statements", which is defined as including and not just as meaning words either spoken or written, is sufficient.

Senator Prowse: Or recorded? Should we have that in?

Mr. Scollin: Spoken or written.

Senator Prowse: Do you mean by a person, or by an electronic device of any nature?

Mr. Scollin: It does not seem to me to matter how they actually come to be spoken, whether through a pre-recorded tape or by some other electronic means. If they are words and they are spoken, I do not really think I would be inclined to argue—I would not want to be found arguing in favour of the proposition, simply because the words were spoken yesterday and recorded and then repeated today, that they were not spoken words. It seems to me that within the definition they are words spoken, and they are spoken and repeated every time you put the record on. They are spoken words. If the noise comes across and hits you in the ear, and you understand it, then there has been communication, and every time those words are repeated there is communication.

Senator Walker: But is it not the Bell Telephone Company that is communicating the statement here? Originally it was this fellow in Toronto who made the tape. He rented the telephone from the Bell Telephone Company, but every time that number is called is it not the Bell Telephone Company and its communications system which is communicating the statements?

Mr. Scollin: It may very well be that in addition they are, but I do not think one can hold the original man blameless. It strikes me as being a bit too narrow to say that because the recording is played over the telephone he is not communicating the statement.

Senator Croll: If I speak to Senator Walker then I speak to Senator Walker and not to the telephone. If the answering service answers it is still not the Bell Telephone Company. They are solely the medium, are they not? They are not communicating.

Senator Prowse: Mr. Scollin, what I have in mind is this: The criminal law is probably the most technical part of all our law, and in order to get a conviction you must bring a person strictly within the law. The law must be interpreted strictly by the courts, according to their rules, and any kind of technical defence is available to a defence counsel in a criminal prosecution. It seems to me that there are two possibilities here. Spoken signals indicate that we are after a person who is responsible. I would argue in the first case for the signal. Now, when you get it through an electronic device is that person then responsible within the law, or not? In other words, can we tighten it up?

The second thing is when you say "communication"—in the modern interpretation of the word, for me to communicate with you does not mean for me to say something to you. It includes my saying something and your understanding, or hearing, or receiving what I say. It seems to me that there could be a defence here on the grounds that the statement was not received and, therefore, there was no communication.

In other words, should we go further than this general word "communication"? Should we make it clear that a statement includes the repetition of it by electronic devices. Whether we want to get the Bell Telephone Company for repeating it, or whether we want merely to get the guy for putting it out, is something for this committee to determine. But, I think this could be a ground of defence once you get out of the trial and into the appeal aspect of the prosecution of any case.

Mr. Scollin: I would put it this way, Senator Prowse; my own approach to this situation of communication by these various modern kinds of devices is that the definitions as they are set out here are sufficient, noting the spirit and intent of the act, and bearing in mind the fact that section 11 of the Interpretation Act does require every statute, including the Criminal Code, to be given fair, large, and liberal interpretation.

However, this is a matter on which, I think, if enough honourable senators such as yourself feel there is an area of doubt, then naturally since this is intended to be struck out, one could not oppose some form of clarification, if it was felt that clarification was wanted, to include the words "whether by telecommunications, telegraphic, or other communications" or some such form.

Senator Prowse: You see, I have in mind that when I look at the definition of "statements" in paragraph (c), which is what this is all about, and then I apply the *ejusdem generis* rule to "includes words either spoken or written", it is an individual who speaks or writes; it is an individual who makes gestures; it is an individual who makes or uses signs or other visible representations. I would therefore say that this reference to the

original party and not to, shall we say, a bookseller, who distributes literature, who did not write it, speak it or make a statement, who is not even communicating but is just distributing something, is a weakness that provides a wide open hole for any responsible attorney who undertakes the task of making a defence. This is particularly true of the general principle of law that in the interpretation of the criminal law there will be given not a wide or a liberal but a very strict interpretation.

Mr. Scollin: That would be contrary to section 11 of the Interpretation Act.

Senator Prowse: When one gets into the criminal law, the general principle involved is anything that interferes with the rights; it must be strictly interpreted. Your section 7 reserves the common law principles except as they are set out or may be specifically ejected from the Criminal Code. As an overall principle, our courts have accepted and are today guided by this principle in their interpretation of the criminal law. The Crown in a case does not make a moral judgment, it makes a technical judgment, and one must be brought within the narrow confines of the legislation or there is no offence. It may be morally reprehensible or it may be something else, but this is what I am concerned about.

Mr. Scollin: I see your point on the word "statements" and the word "communications".

Senator Prowse: I think the word "communications" should be defined.

The Chairman: Section 267B(1) says:

Every one who, by communicating statements in any public place.

Supposing after the word "statements" we added "by any means," would that not be broad enough to cover electronic or any other machinery, such as the telephone?

Senator Prowse: I am concerned that in modern usage "communicates" has a connotation today in which there is a two-way interplay, an exchange.

Senator Grosart: That is not just modern usage. The word has meant that since it came into the language.

Senator Prowse: With all respect to Senator Grosart, if I go into court to defend somebody I have everything at my disposal, every device I can think of, and I would say that when this is written in 1969 it must be presumed that the words used are intended in their 1969 meaning.

Senator Grosart: I agree with you in that sense.

Senator Prowse: In most courts this would be a substantial argument when presented by the defence if it narrowed down the area covered by strict interpretation of the law, which criminal courts apply.

Senator Choquette: Is one to have no defence at all? Surely he will be left something to play around with. Are you going to tie him in a knot altogether?

Senator Prowse: I think the best law is the one that is never challenged.

The Chairman: Honourable senators, time is slipping by. Would it strengthen the situation if we said: "communicating statements by any means"?

Senator Prowse: Might I suggest that Mr. Scollin be given some opportunity to think this over and come back at another time, now that we have noted our concern? He may find the concern is not justified by the facts. On the other hand, he may feel it does mean that there is a loophole here which should be filled, and he is the man to fill it.

Mr. Scollin: At the present I disagree with you, senator, but I respect your view and I should like to examine these two aspects. There is first the word "communicates", and secondly the significance of the scope of the word "statements" because of the definition, restricting it apparently to words spoken or written. I take it those are the two points.

Senator Grosart: There are definitions of "communications" in other acts which should be looked at. The Radio Act and Broadcasting Act define "communications", usually with a qualifier, "communication by radio" and so on.

Senator Prowse: Usually for specific purposes in those acts.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: I think Mr. Scollin will get considerable help from the evidence given at the last meeting by the Bell Telephone of Canada who explained the phonograph and how they were involved. I think that would be helpful.

Mr. Scollin: I have asked for a copy of that as soon as it is printed.

The Chairman: We will see that you get it.

Senator Prowse: The Bell Telephone Company said they carried out these things that they found reprehensible because they had no legal basis for refusing. If the act made them guilty of an offence if they carried it out, knowingly at least, they would be able to refuse to do it if they were concerned, and would put not on

themselves but on the person who might be refused the onus of determining whether the material he wanted covered was entitled to this kind of distribution. This is what I have in mind.

Senator Grosart: Senator Cameron had included in the Senate *Hansard* some hate literature. Would he be guilty of communicating that?

Senator Prowse: That is absolute privilege.

The Chairman: We have no privilege against breaking the criminal law.

Senator Prowse: You mean we cannot shoot somebody.

Mr. Scollin: In the case of defamatory libel the code goes out of its way expressly to exempt statements in those circumstances.

Senator Grosart: This amendment also goes out of its way to do the same thing.

Mr. Scollin: It has not so far.

Mr. Hopkins: This bill does not contain any comparable exception.

Mr. Scollin: Section 256 of the Criminal Code at present has an express exemption covering parliamentary papers in the case of defamatory libel which, in effect, says:

No person shall be deemed to publish a defamatory libel by reason only that he (a) publishes to the Senate or House of Commons or to a legislature, defamatory matter contained in a petition to the Senate or House of Commons or to the legislature, as the case may be (b) publishes by order or under the authority of the Senate or House of Commons or of a legislature, a paper containing defamatory matter or (c) publishes, in good faith and without ill-will to the person defamed, an extract from or abstract of a petition or paper mentioned in paragraph (a) or (b).

Senator Croll: This would extend to municipal councils?

Mr. Scollin: Section 256 does not.

Senator Croll: I was just curious.

Senator Prowse: I think the question of privilege in civil actions in municipal councils, there has to be some privilege extended to them on the basis of their duty to inform.

The Chairman: Are you hearing that?

Mr. Scollin: Yes. I would think as a practical matter this would hardly be a situation where rule 267B(1) would apply in any event.

Such incitement is likely to lead to a breach of the peace. . .

One could hardly presume that in the Senate or in the house either section 267B(1) or 267B(2), offences would be in the course of commission. The reading in of any such material would have objects far removed from a commission of a criminal offence.

Senator Grosart: Rule 267B(2) does not have the qualifier of inciting hatred or contempt.

Mr. Scollin: Wilful promotion.

Senator Walker: Why would you have in subsection 267B(2) "wilfully" promote and 267A(1) without any "wilful"?

Mr. Scollin: I think the reason has to be sought in the different objects of the two subsections. Subsection (1) is directed basically to preserving the public order and therefore it is not perhaps a relevant matter whether the party making the statements did so wilfully or not wilfully. The question is: is public order endangered under subsection (1)? Subsection (2) does not involve as an element the breach of public order and the essential requirement is that what has been said must be wilful promotion. Purely unintentional promotion of hatred and contempt is not covered.

Senator Walker: 267B(1) is covered is it not by section 248(2)(a) of the Criminal Code which includes defamatory libel and also section 160 of the Criminal Code causing a disturbance. Why do we have to have these refinements? Are these matters not already covered by the law?

Mr. Scollin: Defamatory libel is against a person.

Senator Walker: I know it is against a person.

Mr. Scollin: Against an individual.

Senator Walker: Yes and also can be against many persons.

Senator Prowse: No, not unless they are a corporation, unless they are a person as far as the law is concerned.

The Chairman: Unless they are indicated not in general terms, but you can libel more than one person at one time.

Senator Walker: They have to be identifiable as the people and can be more than one.

The Chairman: The finger has to point them out.

Mr. Scollin: Yes.

Senator Walker: That is already covered, is it not, by section 247 of the Criminal Code?

Mr. Scollin: Defamatory libel.

Senator Walker: Yes.

Mr. Scollin: The effect, I think, of the Canadian decision is reasonably well set out at page 42 of the report of the special committee. It points out the two "group" situations in which plaintiffs in Canada have been successful in proving, for the purpose of recovery of damages, that they were defamed. They involve a sufficiently close identification of the members of the group as individuals. The reference to the group is merely a cloak or cover for an attack against an easily identifiable individual; in this case the group itself is such a limited class that the identification of the individual who is aimed at is easy. The principle of the protection is that although a group may be officially the object of the defamation, an individual has got to be able to point out that he has been so closely and clearly identified under the cloak of that group that he has got the right of recovery. Section 248 does deal with persons, not groups, not bodies, but is directed towards the reputation of the person. Now, the definition of person in subsection (15) of section 2 of the code runs like this:

(every one," "person," "owner," and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies; and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively;

Senator Walker: That is pretty broad is it not?

Mr. Scollin: No, I tend to disagree in terms of what the bill here is doing. These are virtually easily identified or distinguishable bodies; for example, belonging to a parish or a municipality in relation to the acts and things they are capable of doing and owning, but not a group of the rather broad and perhaps, to some extent, nebulous kind that is dealt with here in the bill. That is a group distinguished by a very broad characteristic such as colour or race. I would say they are not covered under the defamatory libel section.

Mr. Hopkins: Could you identify that definition more specifically for my benefit? Where is the definition of persons quoted?

Mr. Scollin: It is included under section 2 of the Criminal Code, subsection (15). The other section I think you referred to was section 160.

Senator Walker: Yes, what is section 160? "Causing disturbance" I believe it is.

Mr. Scollin: Well, section 160(a), which I take it is the one we are looking at, says:

Everyone who not being in a dwelling house causes a disturbance in or near a public place . . .

including by the following means:

(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language.

Now, there is no restriction as to whether the insulting language or the obscene language should be used against an individual or a group or an identifiable group or anything of that sort: it is a question of whether it falls within the terms "insulting". It might very well be that that would cover insults against even a fairly broad group. But the essence of the provision is actually causing a disturbance. The disturbance has to have resulted, before anything can be done about it.

Senator Prowse: In other words, you get a broad coverage within the word "insulting".

Mr. Scollin: I do not know whether that answer is satisfactory or not.

Senator Walker: I want to congratulate you on the way you are explaining everything. There may be a difference of opinion, but you are doing a good job.

Mr. Scollin: Thank you very much, sir.

The Chairman: Thank you, Senator Walker.

Mr. Scollin: Honourable senators, if I might move on to subsection (3) of section 267B, this subsection provides a defence to the person accused under subsection (2) only, that is, the person who is charged with wilful promotion of hatred. It does not provide any defence for the person charged under subsection (1), which deals with the public incitement. Again, the reasoning would appear to be that where public order is at stake, a question of the truth or falsehood, or the belief in the truth or falsehood, or the public interest, does not arise.

Therefore, the defence relates to subsection (2) only—wilful promotion—and provides two defences, that are framed on the defences that are available already under the Criminal Code, in the case of defamatory libel.

Section 259 of the Code provides in the case of defamatory libel that no person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that on reasonable grounds he believes is true and that is relevant to any subject of public interest the public discussion of which is for the public benefit.

Now, subsection (3) (b) has been modelled on that and subsection (3) (a) is a recognition that proof of truth is an absolute defence.

Mr. Hopkins: The burden being on the accused.

The Chairman: He establishes it.

Mr. Scollin: The burden is on the accused in respect of establishing either of these defences, which of course are alternative defences.

Senator Prowse: This creates an exception, so if it is for the benefit of the accused, then he must decide whether he comes within the exception. It is not the responsibility of the Crown to prove that it does not fall into the exception, to establish their case. If they establish their case, he must establish that it falls within the exception.

Mr. Scollin: That is established in the Code expressly for summary conviction matters. It is not expressly set out in the Code in respect of indictable matters. But the same principle is applied. Thus, in summary conviction matters, section 702 of the Code provides in subsection (2) that the burden of proving an exception, exemption, proviso, excuse or qualification prescribed by law, operates in favour of the defendant, is on the defendant.

In the case of indictable offences, as I say, there is no express provision comparable to that, but in a case where a matter must be specifically within the knowledge of the accused, the rule has been applied that then it is a matter for the accused to establish and not for the Crown to negative.

Senator Prowse: But even in an indictable offence, in setting out a count in an indictment, the Crown does not have to deny the existence of an exception. It merely has to prove that he did set out such and such a thing to the contrary. So, there is almost an implied inclusion of it.

Mr. Scollin: If it is a matter on which the Crown does not have the burden, then I think it is fair to say that in the absence of an express provision it needs to be set out in the charge itself—but there is a difference between setting it out in the charge and actually negating it by evidence. The Crown may be obliged to set it out in the charge, even though the burden of negating it by evidence is on the accused.

The Chairman: You usually write it into the indictment.

Mr. Scollin: I have always put any of these exceptions into the indictment, since it is an essential part of the offence and if there is a warrant on conviction,

the warrant would include it. But the burden of proving this aspect is on the accused and not on the Crown.

With your indulgence for a moment, honourable senators, I may be able to be of some further help, on the sources of these defences. Perhaps all I need to add here is that the reasoning of the special committee obviously must have commended itself on this point. The form of subsection (3) follows the recommendations of the committee contained on page 68, and, on page 66, they observe that "The two defences of unqualified truth, and reasonable belief in the truth coupled with public benefit, provide considerable, and we believe adequate, latitude for legitimate public examination of all matters of concern to it, . . .".

Since, in respect much of the material that would fall within the ambit of this bill, it would be very difficult, if not impossible, for the Crown to negative the truth of the material, the burden on this is placed on the accused.

Senator Choquette: Mr. Scollin, if the door is not open to the accused with respect to these two alternatives, we still go back to the question of wilfulness. There is an onus on the Crown, which would be almost tantamount to a third alternative, in respect of "wilfulness". The case may be dismissed unless the Crown has proven it was wilfully made for the purpose of enticing people to hatred.

Mr. Scollin: I agree.

Senator Choquette: So the case falls right there, if the word "wilfully" is not met by the Crown.

Senator Prowse: It is a rather good defense, because it is a broad positive requirement of establishing guilt. An essential ingredient of the offence is the wilfulness of the communication, or whatever the allegation against the accused is; for example, the incitement.

Senator Choquette: That is right.

Senator Prowse: That is a rather good defense.

Senator Eudes: Would I be correct, Mr. Scollin, in assuming that a person accused of communicating hatred or contempt, if he could establish that the statements communicated were true, could not be convicted because of clause 267B (3) (a)?

Mr. Scollin: That is correct. There could be no conviction under subsection (2) in that case.

The Chairman: Unless it is made in a public place, with the possibility or likelihood of disturbing the peace.

Senator Prowse: Unless it is done for the purpose of creating a situation which will obviously result in a breach of the peace.

Mr. Scollin: That is correct, but there is no question of this defence arising in such a case.

Senator Eudes: Therefore, just proving the statements are true is a defense, and there is no possible conviction against him.

Mr. Scollin: Under subsection (2), that is quite right.

If I might move on, then, subsection (4) is simply an ancillary provision, providing for forfeiture of the material in the event of a conviction of an offence, either under 267A, which concerns the advocating or promoting of genocide, or under 267B (1), dealing with public incitement, or 267B (2), the wilful promotion provision. The provision is a fairly standard one for forfeiture of this material to Her Majesty in right of the province in which that person is convicted, to be disposed of as the Attorney General directs.

Moving on to clause 267C, on page 3, this type of proceeding was not expressly dealt with by the special committee in its report. The pattern followed, however, is the same as that which was established in amendments in 1959 to sections of the Criminal Code dealing with obscenity. It is patterned on section 150A, which provides similar *in rem* proceedings in the case of obscene materials or crime comics. It is, in effect, an alternative to the actual prosecution proceedings, and provision is made that in the event of proceedings having been taken *in rem* or against the articles themselves, whether the finding is that they are hate propaganda or not hate propaganda, then no further proceedings in the province in which these *in rem* proceedings are taken, either under the promotion of genocide provision or under the public incitement provision or under the wilful promotion provision, will be taken with respect to this material without the consent of the Attorney General of that province.

The idea is that, if proceedings have been taken against the articles themselves and an order made, then there should not be an unnecessary duplication of proceedings.

For the purposes of those *in rem* proceedings dealt with in clause 266C, the subclause (8), paragraph (c), defines hate propaganda to include various material ways in which vilifying statements are contained, such as in any writing, sign or visible representation that advocates or promotes genocide, et cetera. Of course, it cannot include oral statements because it does not deal with anything other than publications, copies of which are kept within the jurisdiction.

Mr. Hopkins: Would it include tape recordings?

Mr. Scollin: I do not think it would.

Senator Prowse: Ought it not to? How difficult would it be to widen that to include such things as tape recorders?

Mr. Scollin: In connection with the two points, I see what you mean.

Senator Prowse: The material necessary for electronic reproduction and this would include punch tapes and magnetic tapes. You could widen the field every day.

Mr. Scollin: At the moment it does deal expressly with publications as set out in 267 (1) in so far as there is reason to believe that any publication is hate propaganda.

The procedure for appeal given in this section is again the same as that already provided for in the case of *in rem* proceedings in the case of obscene material. Very broad grounds of appeal are given in subclause (6) whereby an appeal may be taken not only on law alone or on fact alone and mixed fact and law, and you will notice that as distinct from, for example, the case of an indictable offence, no leave from the Court of Appeal is required. The appeal lies on any of these grounds.

The Law Clerk: In proceedings *in rem*.

Mr. Scollin: In *in rem* proceedings, yes.

Mr. Chairman, that completes in broad terms a rundown of the act itself. So far as the present law in Canada is concerned, I have read very carefully, and I must say I agree with the special committee's conclusions on law that were set out in the special committee report from pages 36 to 51. The law set out there is accurate.

I have not dealt at any length with the English act. If members of the committee wish that to be done, I can do it in general terms.

The Chairman: I wish you would. It is very cogent.

Mr. Scollin: First of all, I did make copies of the article by Assistant Professor Dickie which reviews the 14 or 15 cases that have arisen under the 1965 act. The 1965 act has been replaced by 1968 legislation which is the same in this respect, that is so far as promotion of hatred is concerned. It consists of two parts really; first of all the public order part which corresponds to subsection (1) of section 267B and secondly, the actual promotion of hatred part which corresponds to section 267B, subsection (2).

The Chairman: Are there any defences set out in the English act such as we have in ours, that is, if it is true, it is in the public interest, and so on. Have they made any exceptions in the English act?

Mr. Scollin: No, they have not, Mr. Chairman.

First of all as far as the public order aspect is concerned, the 1936 English Act as amended by the 1965 Race Relations Act reads as follows, and I am now referring to section 5 of the Public Order Act, 1936, which now reads:

Any person who in any public place or at any public meeting

- (a) uses threatening, abusive or insulting words or behaviour, or,
- (b) distributes or displays any writing, sign, or visible representation which is threatening, abusive or insulting

with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned shall be guilty of an offence.

Now you will notice first of all that an intent is specified—"with intent to provoke a breach of the peace" and the alternative—whether or not he has the intent—is "whereby a breach of the peace is likely to be occasioned". So it is an offence under the Public Order Act if either alternative is satisfied, either the intent to provoke a breach of the peace, or else the likelihood that it will happen. The statement must have been made in a public place or in a public meeting, and the words are categorized in that they must be threatening, abusive or insulting words. So there is some classification of the content—the language. The alternative is the displaying of threatening or abusive or insulting signs or visible representations.

Now this is not in terms restricted to matters which relate to race, religion, colour, or anything of that nature. The test is whether by threatening, abusive or insulting words or behaviour a breach of the peace is either intended to be provoked or likely to be provoked.

The Chairman: We do not describe the words at all, do we? What we do is to say what the effect of the words is.

Mr. Scollin: The Canadian proposal here does, as you say, refer to the effect of the words. It is related to hatred or contempt against identifiable groups. That is missing from the main public order provision of the English legislation.

Now the incitement provision is contained in section 6 of the Race Relations Act of 1965. I do not know that it is very helpful to clutter up your record with reading this in detail when it is already reproduced at pages 96 and 97 of the special committee report. But section 6, which is the racial hatred section, says that:

A person shall be guilty of an offence under this section if,

—and then it specifies the intent—

with intent to stir up hatred . . .

You can contrast this with the formula of "wilful promotion" which is contained in Bill S-21.

with intent to stir up hatred against any section of the public in Great Britain distinguished by

—and they have the four tests:

colour, race, or ethnic or national origins . . .

The Chairman: They leave out religion there, do they?

Mr. Scollin: Yes, they leave out religion. They do have the words "national origins" in, which are not in the Canadian bill.

Then you have the two alternative offences. A person who with intent to stir up hatred against a section as mentioned is guilty of an offence if

he publishes or distributes written matter which is threatening, abusive or insulting being matter or words likely to stir up hatred against that section on grounds of colour, race or ethnic or national origins

Again, the qualification about "threatening, abusive or insulting" is an inherent qualification which does not occur in the Canadian legislation. Then there is the alternative, dealing with "public place" whereby a person is guilty of an offence if

he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins.

If you will look at the reprint on page 96 of the special committee's report, you might note that the margining is not as clear as it might have been; they have not followed the act exactly in the margin.

Paragraphs (a) and (b)—that is, publication or distribution of threatening, abusive or insulting written matter, or the use in any public place of threatening, abusive or insulting words—are both qualified by the words "being matter or words likely to stir up hatred . . ." and so on.

The British Act qualifies the word "publish" in a way which is not followed in the Canadian Act. The Act says:

"publish" and "distribute" mean publish or distribute to the public at large or to any section of the public not consisting exclusively of members of an association of which the person publishing or distributing is a member;

What this appears to contemplate is that within a group you can do private hate mongering, that you can circulate the stuff around until you are ill, as long as you do not spread it outside the group. There is no such exception created in the Canadian legislation. But, again, you will note as far as public order is concerned it is not required by the British Act that a riot should actually erupt. It is sufficient that the words themselves be "matter or words likely to stir up hatred". As in this Bill, there has to be an assessment of likelihood.

The penalty under section 6 ensues either on summary conviction or conviction for an indictable offence. Under this act there have been some 13 or 14 prosecutions, and the extract from the Criminal Law Quarterly, which I had distributed, sets out the outcome of these prosecutions. With very few exceptions they have not been reported in the law reports, but simply in the *Times* and other newspapers.

You will notice that the United Kingdom legislation has this requirement that the attorney general's consent is required for the initiation of proceedings so far as England and Wales are concerned.

The special committee, in making its recommendations on page 71 of the report, said:

The Committee considered the advisability of requiring the consent of the Attorney General of the Province or of Canada to each prosecution instituted under the legislation proposed in order to prevent frivolous or unwarranted prosecutions, and without making any recommendation, we draw the Minister's attention to this possibility.

You will notice that this course has not been followed. There is no requirement in the Bill for the attorney general's consent, except in the one case where *in rem* proceedings have already been taken.

Senator Prowse: Except he is the only person who can prefer an indictment?

Mr. Scollin: Yes, as far as indictable is concerned, but so far as summary conviction proceedings are concerned a private party can carry those, and a private party could get as far as a committal for trial before the attorney general gets involved in it.

Senator Prowse: Except that he can become involved at any time, if he wants to.

Mr. Scollin: Yes.

The Chairman: The crown attorney is involved right from the very first, even with a private party.

Mr. Scollin: Not necessarily, Mr. Chairman.

The Chairman: He has pretty nearly got control, has he not? Not quite?

Mr. Scollin: Not quite. A private party does have his rights. If he feels the law has been broken, he has his rights to lay an information and occasionally, as the law reports show, take the unhappy consequences of malicious prosecution and all the rest.

Senator Choquette: I think last week, at my request and the request of others, you were going to look into the question of "judge" under section 267C.

Mr. Scollin: I have done that, senator. The jurisdiction under section 267C is exercised, as is the jurisdiction under section 150A, dealing with *in rem* proceedings, in provinces other than Quebec only by county or district court judges and not by provincial judges.

Senator Choquette: Who were formerly magistrates.

Mr. Scollin: Yes.

Senator Lang: Are the offences under the English act confined to public places?

Mr. Scollin: Under section 5, the General Public Order Act, the modification of the old black shirt, Moseley provisions, they are related only to public places. But section 6 is not restricted to public places. Section 6, passed in 1965, has two parts. Subsection (1) of section 6 says in paragraph (a):

- (a) he publishes or distributes written matter which is threatening, abusive or insulting . . .

being matter likely to stir up hatred against any section of the public.

That is the offence, and it does not matter where it is done.

Paragraph (b) is:

- (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting . . .

So, the actual verbal threats or insults are restricted to public places or meetings.

Perhaps I should read the whole section. Section 6 is:

- (1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins —

- (a) he publishes or distributes written matter which is threatening, abusive or insulting . . .

If it is written matter it does not appear to matter whether it is public or private.

. . . or

- (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting . . .

And in both cases, being material likely to stir up hatred against a section of the public. So, it has both the aspect of a public place in the case of the use of words, and the aspect of publishing and distributing in respect of written matter.

There was amendment in 1965 also to the old section 5 which related only to public places. That is the straight offence of either using in a public place any threatening or insulting words of behaviour, or using or displaying signs which are threatening, abusive or insulting with intent to provoke a breach of the peace. So, this would include a distribution at a public meeting of scurrilous material which is either intended to breach the peace, or likely to provoke a breach of the peace.

The Chairman: It seems to me that we would find it very serviceable if you could supply us with a copy of that act. I see that you have the act and the amendment. It seems to me that if a copy of it were printed as an appendix to today's proceedings it would be very useful to us.

Mr. Scollin: This is the only copy I have. It is the Race Relations Act, 1965 of the United Kingdom, and this is a consolidated copy.

The Chairman: Then, let us have a copy of it.

Mr. Scollin: As I say, the Special Committee reproduced this in its report, although there was that unfortunate little error of margining. It is to be found at page 96 of the report.

Mr. Hopkins: Yes, that is a bit misleading is it not?

Mr. Scollin: Yes, because it looks as though this part applies only to paragraph (b). However, all of the parts I have read are contained on pages 96 and 97.

Senator Prowse: Mr. Scollin, in one of the acts we looked at on another occasion, the defence of public interest was qualified to the effect that if the words are couched in ordinary and decent language—can you recall from where I got those words? Are they in Code or are they in the Interpretation Act?

Mr. Scollin: Yes, you are thinking of the section that deals with blasphemous libel.

Senator Prowse: Yes.

Mr. Scollin: Section 246 of the criminal code creates the offence of blasphemous libel, and subsection (3) provides:

No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.

Is that the section to which you were referring?

Senator Prowse: Yes. It seems to me that there might be some useful purpose served by qualifying the offences described here by adding the words "in good faith and in decent language". I do not think we defeat the public interest and infringe the individual's right to freedom of speech by insisting that public speeches should be conducted in decent language. That is what I have in mind. I do not know whether this affects the matter, but it might in certain circumstances.

Mr. Scollin: I think that this would be largely a matter of policy, senator. My own inclination would be to say, if what the person said was true, or he believed it to be true, that there is sufficient burden on him in subsection (3) without asking him to prove that he used nice language.

Senator Prowse: There are various ways of saying a person's mother and father were not married. Some are not apt to create a breach of the peace, while others are almost bound to.

Senator Croll: I remember that a member of the legislature of Michigan, I think, wanted to be pretty rough with an opponent, and he said: "I am not going to call you any names, but when you get home and your mother runs out from under the steps and bites you, you will know what you are."

Senator Prowse: By the time he has figured out what is meant, Senator Croll, the person who said it has probably gone on his way, and no breach of the peace will occur.

Senator Eudes: Mr. Scollin, I am trying to compare section 267C(4) with section 267B(3) (a) and (b). Section 267C(4) says:

If the court is satisfied that the publication is hate propaganda, it shall make an order . . .

Suppose that this propaganda material has been used by a person accused. If that person did not wilfully promote hatred or contempt, or showed reasonable grounds for believing it was true, he would be acquitted. Today many students would come before the

court and say, "We were taught that this was true, so we had reasonable grounds for believing it was true". That might be going a little too far. While this bill does not add anything to the Criminal Code, it is a new departure and opens so many doors for defence lawyers that a conviction would seem to be almost impossible.

Senator Prowse: There are many Criminal Code sections that include "wilfully," and to determine an offence the court insists on proof of *mens rea*; they presume the act must be wilful.

Senator Eudes: This is not the Criminal Code.

Senator Prowse: It is, yes.

Senator Eudes: It is an act to add something to the Criminal Code.

Senator Prowse: Once it is added it is in the Criminal Code.

Senator Eudes: Then we would not need the word "wilfully" because in the Criminal Code a criminal intent is presumed.

Senator Prowse: When you look at "wilfully" on the one hand and "reasonably" a subjective meaning in its application and determination, it is given an objective meaning. In other words, the fact that a man is stupid and would believe anything does not provide him with a defence. The test is whether a reasonable person being presented with that set of facts would accept them as true. It could affect the sentence, but it would not affect the determination of guilt.

Senator Eudes: In section 267B(2) it is "wilfully", and then in subsection (3) it says:

that the statements communicated were true.

It is on reasonable grounds so that all possible doors are opened for a clever defence lawyer. My first concern is how to reconcile subsection (4) under which the hate propaganda could be seized.

Mr. Scollin: In other words you may end up with what is apparently hate propaganda, and although the Crown may have got past the hurdle of proving that what the accused did was wilful, the accused may have justified an acquittal by bringing himself within the defences available and a large pile of material is released back to him, presumably to do with as he wishes.

Senator Prowse: Let us take a specific example. Suppose I have a page of hate material and hire a public delivery service to distribute it for me. It is in sealed or semi-sealed envelopes and I pay the delivery service

the regular fee for putting them into all mail boxes along the road. There is nothing in the material to indicate whence it came, so a charge is laid against the distributor. In that case he would have the defence of "wilfully", but at the same time he leads us to where it came from, and we would then have the remedy of assessing what was wrong with the material under subsection (4).

Senator Eudes: That is one example. Let us take another. A person uses material upon which to base a speech. All the material is seized by order of the court. The person using the material for his speech would be acquitted because he would be able to say, "I believed what I said was true".

Senator Prowse: A person might reasonably accept it as true, but he would then have to prove that it was reasonable for him to believe it was true.

Senator Eudes: Let us go over this. Section 267B(3) says:

that the statements communicated were true; or ... that on reasonable grounds he believed them to be true.

Senator Prowse: First he has to prove it is true if he claims truth as a defence, and that can be rather difficult.

Senator Eudes: I am taking the position of the defence lawyer. I could find many grounds on which I would be able to have an accused person acquitted.

Mr. Scollin: Would there be any reason why immediately thereafter, if the material is of this very offensive nature, even though your client may have been acquitted, the provisions of section 267C, the *in rem* provisions, could not be used?

Senator Eudes: Senator Prowse cited a very good example. Suppose this material were in the mail.

Senator Prowse: Not in the mail, because presumably we cannot convict the Crown. Suppose they use a commercial distributing agency, many of which are available.

Senator Eudes: This was the point I wanted to bring to your attention.

Senator Walker: I think it is a good point.

Senator Prowse: The second thing I think we should keep in mind in establishing whether or not an action is wilful is that it is impossible to prove by direct evidence what a person's state of mind was—which is what "wilful" is—at the time he did the particular thing. The court must determine that by inference

from all the surrounding circumstances. This is where the question arises whether a person thinks something is true. Suppose I make a speech in public quoting from what I think is a copy of *Life* magazine, but it is a forged copy of *Life* or a forged photostat made to look like a page out of *Life* magazine. The only way in which a court could decide whether I may reasonably believe it to be true is by saying to themselves: "Would any reasonable, ordinary person being presented with that be prepared to accept it as true or would they have made further inquiries?" The number of inquiries I may have made in order to check out my source will be relevant to the determination of whether I reasonably believe it to be true.

Senator Eudes: That would not be wilful; it would be good faith.

Senator Prowse: You are going to have people on borderline cases and it may disturb somebody, and other persons may be—

Senator Eudes: There are two different things—wilful to do something with intent, and in good faith. What we are saying, to my mind, is that it is more related to good faith than to the intent.

Senator Prowse: We are dealing with two things. One is the person who wilfully does something to incite, and wilfully surely goes with the incitement—he does it wilfully for the purpose of inciting. The second thing is the offending statement, whether he reasonably believes it to be true. You can say "reasonably believes" or "in good faith." The way you determine good faith would be again on the basis of a reasonable man's approach.

Senator Eudes: It means the subparagraphs are related together.

Senator Prowse: In any interpretation of the act I think you have to look at the different sentences in order to get the precise meaning. If you read the English cases, they ran about 50-50 did they not? They got some convictions and some acquittals.

The Chairman: And they learned a great deal from the witness.

Senator Prowse: I would say we should start somewhere, and experience will indicate to us perhaps that it may be desirable that we should make some amendment to this as we have had more experience with it, the way it works out in practice and the reaction of the public and of the courts. I do not think we can foresee with 100 per cent accuracy a law that would permit 100 per cent convictions, nor do we hope to put one so sloppily together it would permit 100 per cent acquittals. This would defeat our whole purpose.

Senator Walker: I have no more questions.

The Chairman: Have you got any further points, Mr. Scollin, that you want to clear up?

Mr. Scollin: I think not, Mr. Chairman.

The Chairman: Are there some general observations?

Senator Eudes: There is one, Mr. Chairman. In section 267A, subparagraph (b)—I have been checking this matter and the word prevent should be translated by *empêcher*.

Mr. Scollin: I am raising this matter with our translators. *Prévenir* and *empêcher*. On the question of *empêcher* I have raised that already and on the question of the other point which you raised, *acte criminel*, it seems to be the standard translation throughout the code for the word indictable.

Senator Eudes: *Empêcher* translated to mean prevent.

Mr. Scollin: Yes, I have raised that with them. I would be happy to raise any other points which you care to communicate to me on the translation end.

Mr. Hopkins: They will all have to be moved as amendments in this committee.

The Chairman: We shall come to the actual machinery of amending before very long. Immediately after the recess we will go into the question of what amendments we want made; in the meantime we are just studying.

Senator Prowse: As a matter of procedure, Mr. Chairman, perhaps what we should do is to have the Clerk of the Committee keep a list of suggested amendments and then once we have the evidence in we can deal with them. On the other hand, there is the possibility that the various witnesses who appear before us might care to make some representations with regard to proposed amendments. Perhaps the committee itself would want to concern itself within a special meeting as to what procedures we should take.

The Chairman: Could you do that, Mr. Boudreault.

The Clerk of the Committee: Yes.

The Chairman: That will be done, and we will have a list of proposed amendments.

Senator Prowse: There was a question raised the other day. I wonder if I might raise it with Mr. Scollin now. It was suggested by witnesses who were here last week that in section 267A, which refers to groups, and

in section 267B(5) (b) which refers to "identifiable group," there is no definition of group, and they thought it would be an improvement on the legislation if we were to put in section 267A (2), in the definition of genocide all the way through wherever "group" is mentioned, that it should be "identifiable group."

Mr. Scollin: It would be difficult to disagree with that suggestion.

Senator Prowse: I just wondered if there was any particular reason. I could not remember whether the question was raised before or if there was any particular reason you had not put "identifiable group" all the way through.

Mr. Scollin: I think I made the remark that the words "virtually any group" were used in section 267A for genocide, which is not in accordance with the special committee's recommendation and not in accordance with the Convention, so that perhaps the object was to spread the genocide net wider still, but one can see the logic of talking only about identifiable groups and defining them.

Senator Prowse: If you do not have "identifiable group" in there the courts could have some problem because how wide does "group" go?

Mr. Scollin: I agree, senator.

The Chairman: Somebody suggested that it might take in the Maple Leaf hockey team, McKinley umpire, but I do not altogether go with it because if you say anything you cover the identifiable groups and I can see an offence in advocating the murder or the genocide of any group.

Senator Prowse: If it has any effect at all, Mr. Chairman, I would think the effect would be to very strictly narrow the interpretation of "identifiable group." In other words, where you use a general term in one part of your act and then use a specific phrase, using the same word in another part of the act where the word is subject to an adjectival limitation, then there are two courses open to the courts. Either it broadens the general word or it narrows the word when it is included with the adjective. Now, this could be a matter of some concern in the interpretation of this legislation.

Senator Eudes: May I mention section 267A(1):

(1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.

(2) In this section "genocide" includes any of the following acts . . . :

(a) killing members of the group; . . .

If you go under the Criminal Code, you will get more than five years for that.

Senator Prowse: It is "advocating".

Senator Croll: This is not killing; this is advocating.

The Chairman: Advocating.

Senator Prowse: There is a little difference, too, in the spirit of the general application. If I say that somebody ought to kill those so and so's, it is not a crime at the present time, I hope.

Senator Eudes: If this legislation did not exist, and if the same person committed the same criminal offence under the Criminal Code, what would the imprisonment be—ten or five years?

Senator Prowse: One is for advocating, the other is for acting.

Senator Croll: Conspiring.

Senator Prowse: Conspiring goes beyond mere advocacy or promotion, I would think.

Senator Eudes: It says "acts committed with intent" to do this.

Mr. Scollin: That is not a penalizing subsection. If in fact members of a group are killed, with intent to destroy the whole of that group, then this is what the legislation means when it uses the word "genocide". Any person actually doing that killing, no matter what the intent, if he killed even one, would in fact be guilty of murder.

The word "genocide" is only to be defined so as to give meaning to subsection (1) which prohibits any person advocating genocide—and when you are talking about that, you want to know what you mean by genocide so that you do not advocate genocide.

Senator Eudes: Killing a group of 20?

Senator Prowse: The difference is that this section does not say we make it an offence to kill 20 of a group, or 200 of them. This makes it an offence to say that somebody ought to kill those people—which at the present time is not an offence.

The Chairman: The code as it stands, covers conspiracy to do these things. What this bill before us deals with is the advocacy of this, and it is a different thing to advocating something in general terms or conspiring to do it. It is quite a different matter.

Senator Eudes: These are the matters that have to be clarified in the bill.

The Chairman: The penalty in the Code is for conspiring, which is a pretty dangerous thing to do. The penalty in this bill, which is a good deal less stringent, is simply for generally advocating it. I think this explains the definition—the severity of it.

Senator Eudes: I asked about this because I wanted it to be clarified in my mind.

Senator Hollett: Are there any known cases in Canada of “forcibly transferring children of a group to another group?”

Senator Prowse: We are not dealing with that. We are dealing with cases where people advocate it.

Senator Hollett: All right. Have you known cases where they advocated it?

Senator Prowse: Let me give you a couple of examples right now. We forcibly, but within the law, took the Doukhobor children away from their parents in British Columbia. Now, this was not for these purposes, but it was done. It was done because it was considered a matter of public policy that it was desirable that the children should be brought up, at this stage when their parents were imprisoned, by taking them out of the environment which we felt was adversely affecting their future as Canadian citizens.

Senator Hollett: You gave reasons for it.

Senator Prowse: Whatever the reasons, this is what happened. During the war we have forcibly transported Japanese from the west coast and made farm labour of them in the prairie provinces in the sugar beet areas down in southern Alberta.

Senator Lang: If I advocate that, should I be guilty of genocide?

Senator Prowse: I would think all these things are coupled with special circumstances. When I look back on it now, I think we do not take much pride in it. On the other hand, people in this country today are beginning to advocate, for example, the use of force for various public purposes—it is not limited to one group, I am sure. We have seen some pretty startling examples of it recently.

If you read the reports in England, there were four cases involving white people suggesting that something should be done specifically to coloured persons. There were three cases involved, in which six negroes were suggesting that there should be violence used against the whites.

Let us not kid ourselves that we are so far removed from the situation. It must be a problem today in the United States.

Senator Hollett: Can you answer this question as well as you answered that, and I must say you have answered it very well. As to “deliberately imposing measures intended to prevent births within the group”—have we any cases of that kind in Canada?

Senator Prowse: I have heard people say that we should sterilize the whole bunch of them—referring to a group. I have no doubt heard it as I am sure you have, that one should sterilize the whole lot.

Senator Hollett: I have not heard it.

Senator Prowse: We have a sterilization act in Alberta under which the province permits the government, if necessary, and with sufficient safeguards, to sterilize certain people whom it may feel are apt to pass on, if they became pregnant, children who would merely become a charge on the State. This applies to people usually coming under the Mental Diseases Act.

Senator Hollett: In that case, it is “humane proceedings”?

Senator Prowse: It seems that it is.

Senator Hollett: Can we not be humane?

Senator Prowse: I have heard people, without any thought of humanity, speaking of a group of different kind, saying one ought to sterilize the bunch. Whether they meant it or not, that does not matter; but you get people who say that may be the solution.

Senator Lang: If I advocate that, am I guilty of genocide?

Senator Prowse: Yes.

Senator Croll: In the context, I do not know what people are advocating, but I picked up a paper a while ago which said that at one of the college meetings there was some leader who stood up and was advocating that everyone over 50 should be shot.

Senator Prowse: He got a standing ovation.

Senator Croll: I must say I was not entering into the spirit of it, but I was a bit surprised and shocked to hear a college student stand up and advocate it, and the papers seemed to indicate that he was not even smiling. So it is difficult to say what is being advocated in this country today. Let us just make sure that it does not get out of hand.

The Chairman: Or will be advocated in the future.

Senator Prowse: Someone once said there was no class struggle before Marx enumerated the basis for

class struggle. Whether there was before, there surely has been since. In other words, it is now a well accepted fact that the idea often is the precursor of the fact. Now, this is what we are dealing with in this kind of bill.

Mr. Scollin: May I add, in relation to what has been said, that (d) and (e) are not included in the recommendations of the committee in its special report—but they are in the United Nations Convention.

Senator Hollett: Why are they here in the bill?

Senator Croll: The Government has thought of this as a matter of policy, following the Convention of the United Nations.

Mr. Scollin: That is right.

Senator Croll: The Government have added it as a matter of policy, following the convention of the United Nations.

Senator Lang: I am not familiar with the Criminal Code, particularly, but I know that in 267B, here, we have an offence which is anticipatory: "Likely to lead to". Is that a type of offence very common in our Code?

Senator Prowse: It is like the seizure of narcotics.

Senator Walker: Just a moment. Could we have an answer from the witness, please.

Mr. Scollin: It is not common. It is used in section 248, subsection (1), dealing with defamatory libel, where the definition is:

248. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

It is not a question of whether it did or not. It is a question of the likelihood. The same word is used in the United Kingdom legislation in the Public Order Act, where to the same extent the provision is anticipatory. Just a moment, and I will see if I can put my finger on that act.

The Chairman: Honourable senators, may I say that I have to leave now to catch a train. I would ask Senator Prowse to take the Chair, if that is agreeable.

Hon. Senators: Agreed.

Senator J. Harper Prowse (*Acting Chairman*) in the Chair.

The Acting Chairman: Has anyone any further questions?

Senator Lang: I have a question which is still before Mr. Scollin.

Mr. Scollin: The one illustration I gave was from section 248 of the Criminal Code. The comparable section in the British act defines objectionable matter as being matter or words likely to stir up hatred. Again, Section 189 of our Criminal Code again uses the words "likely to".

189. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and is liable to imprisonment for two years.

Senator Lang: This is in our own Code.

Mr. Scollin: Yes, it is. These are isolated usages. I think I am safe in saying that it is not a common usage, but that the words "likely to be" are used when the court has to make some form of estimation of what the consequences are going to be.

The Acting Chairman: Are there any further questions? Is there anything further you wish to say, Mr. Scollin?

Mr. Scollin: I do not think so, Mr. Chairman.

The Acting Chairman: May we have a motion for adjournment?

Senator Walker: Before that, may I suggest, Mr. Chairman, that we are seeking guidance and light. We have not had any evidence yet that I know of which would merit passing a harsh, stringent bill such as this, which is contrary to everything we know about freedom. When are we going to get the evidence to show that this bill is necessary? That is what we are all seeking. We are seeking the light. We had some very brilliant men here last day from the B'Nai Brith and from the Jewish Congress. They were very able. But there has not been one little of evidence indicating that this bill is necessary. I agree with Senator Croll that, if we want to stop the Bell Telephone, all we have to do is just tell them to stop recording those things, and they will not do it.

Senator Croll: Senator Walker and I must agree to disagree. I agree about the Bell Telephone, but I do not think I should make the statement he does that there is no reason why this bill should be passed. I see every reason why it should be passed.

Senator Walker: All right, let us hear one.

Senator Croll: The evidence is coming before the committee.

Senator Walker: Let us hear it.

Senator Croll: We have very cogent evidence, if you see the reasons for it or read the report on which it is based. We will be hearing evidence of people opposed and we will hear them as well. Up to the moment it just happens that these people have come forward. I do not know how they got here, except by application. Others will come and we will hear them as well.

The Acting Chairman: In answer to Senator Walker's question, if I may say this, we have heard representations from one group so far. That group did, in my opinion, place before us information which does not justify the conclusion that Senator Walker has come to, that there was not one tittle of evidence. I would say that they placed before us some very persuasive evidence. I would say that the Bell Telephone representative placed in front of us some very persuasive arguments.

Senator Lang: Senator Prowse, you are in the Chair now.

The Acting Chairman: Senator Lang, a question was asked.

Senator Lang: But you are in the Chair now, Senator Prowse.

The Acting Chairman: A question was asked, and I believe the Chairman has the right to answer questions. That is all I am doing. So far as the record is concerned, if I am Chairman properly or improperly, you can guard against it again, but I do not propose . . .

Senator Walker: Perhaps we should make you permanent Chairman. Maybe you would talk less. You have been making speeches all day. You have not been asking questions. You have been making speeches.

Senator Lang: Why do we not just adjourn?

Senator Walker: I would like you to give me evidence that would necessitate a bill like this. As for your suggesting that the Bell Telephone put good reasons before us, the things their representative had to say were ridiculous.

The Acting Chairman: All you have to do is read the special report.

Senator Walker: I have done that, and I have read the information available from all of the meetings.

Senator Croll: Have you read the special report of the committee?

Senator Walker: Yes, and the report of the Dean of the Law School.

Senator Croll: How could you read that report without being concerned about this business?

Senator Walker: I am concerned, but you have not provided anything yet that would justify this bill.

The Acting Chairman: At any rate, there is a motion to adjourn. I take it we are in favour?

Hon. Senators: Agreed.

The committee adjourned.



First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 4

Fourth Proceedings on Bill S-21,

intituled:

"An Act to amend the Criminal Code".

TUESDAY, MARCH 11th, 1969

WITNESSES:

1. Hon. Mr. Justice Harry Batshaw, Chairman, Human Rights Committee, United Nations Association of Canada;
2. The Jewish Labor Committee of Canada: Mr. Michael Rubinstein, Q.C., President; Mr. Bernard Shane, Secretary-treasurer; and Mr. Rafael Ryba, Secretary.

The Queen's Printer, Ottawa, 1969

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Giguère	*Martin
Aseltine	Gouin	McElman
Bélisle	Grosart	Méthot
Choquette	Haig	Phillips (<i>Rigaud</i>)
Connolly (<i>Ottawa</i> <i>West</i>)	Hayden	Prowse
Cook	Hollett	Roebuck
Croll	Lamontagne	Thompson
Eudes	Lang	Urquhart
Everett	Langlois	Walker
Fergusson	Macdonald (<i>Cape</i> <i>Breton</i>)	White
*Flynn		Willis

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code".

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative."

Extracts from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimburse-

ment as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extracts from the Minutes of the Proceedings of the Senate, Tuesday, March 11th, 1969:

“With leave of the Senate,

The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, March 11, 1969.

Pursuant to adjournment and notice, the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Aseltine, Bélisle, Choquette, Cook, Croll, Eudes, Fergusson, Haig, Hollett, Lang, Macdonald (*Cape Breton*), Prowse and Urquhart.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel;
The following witnesses were heard:

1. Hon. Mr. Justice Harry Batshaw, Chairman, Human Rights Committee, United Nations Association of Canada;
2. The Jewish Labor Committee of Canada: Mr. Michael Rubenstein, Q.C., President, Mr. Bernard Shane, Secretary-treasurer, and Mr. Rafael Ryba, Secretary.

At 4:30 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

L. J. M. Boudreault,
Clerk of the Committee.

THE SENATE

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Tuesday, March 11, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have a very fine program this afternoon, comprising representatives of the Jewish Labour Committee of Canada and His Lordship, Mr. Justice Batshaw of Montreal, whom we will call upon first.

I want to put on record some information with regard to our honoured guest. He is Chairman of the Human Rights Committee of the United Nations Association of Canada; he is also Chairman of the Human Rights Committee of the International Law Association and has held that office since 1964. The committee has 27 members in 19 countries and has met in Tokyo, Helsinki and Buenos Aires to consider the human rights problems. Mr. Justice Batshaw was one of the Canadian Government's delegates to the Inter-Governmental Conference held by the United Nations in Teheran in April of 1968. He was a member of the Executive of the Canadian Commission on International Human Rights in the year 1968.

I am sure we all know of Mr. Justice Batshaw, the distinguished jurist from Montreal. He has been well known to me, at least, for many years as a distinguished member of the bar. On this occasion he is not only thoroughly informed on the law of Quebec and the common law as well, but also has a special interest in human rights and a very great experience along those lines.

We are therefore very fortunate indeed to have a witness of the calibre of the man I am now going to call upon, Mr. Justice Batshaw. Mr. Justice Batshaw, will you please address the committee.

The Honourable Mr. Justice Batshaw: Mr. Chairman and honourable senators, I want to thank you for your invitation to come here this afternoon and share with you the views of the United Nations Association that I represent and at the same time perhaps to present some personal views on this legislation which I have formed as a result of a number of years of specialized interest in the problem of human rights.

The United Nations Association is well known to you; today we have 7,500 members with branches in some 27 cities in Canada from one coast to another. Our membership includes some 500 students and 34 organizations which have become national affiliates. Our president is Professor John Humphrey of McGill, who is a professor of International Law and Political Science, and, who incidentally, worked for 20 years as Director of the Human Rights Division of the United Nations and he was one of the men who participated in preparing the first draft of the Universal Declaration of Human Rights. Our vice-president is Professor D. C. Williams of the law school of the University of Saskatchewan. The chairman of the executive is Professor Hodgins of the University of Peterborough and our treasurer is Mr. Trivett, chartered accountant of Toronto, and Mr. Couture, of Hull is chairman of the executive committee.

The United Nations Association has been dealing with the projected bill against hate literature and group defamation, for some time now and as a result of its studies and deliberations, on March 30, 1968 the executive committee adopted a resolution. I should say

in parenthesis that one of the most urgent current problems which the bill presents is that of whether it constitutes an infringement of free speech or not and this was dealt with at considerable length in the discussions. After hearing both sides, the executive committee adopted the following resolution:

"Be it resolved that:

Whereas the ever present danger of genocide and the effects of incitement to hate towards certain groups, although not an immediate danger in Canada, constitutes a potential and real danger which should not be dealt with when the danger becomes actual;

Whereas Canada is one of the only two countries that have signed the Genocide Convention and have not passed legislation dealing directly with genocide or necessarily ancillary thereto, although morally committed to do so, and,

Whereas Canada is thus morally committed to the passing of legislation in accordance with its commitments under the Genocide Convention, Canada should adopt legislation giving furtherance to the principles adhered to under the Genocide Convention and should adopt such corollary legislation as is indispensable to fully satisfy its moral and legal obligations, that is, anti-hate legislation."

Accordingly, the National Executive Committee unanimously resolved to place this resolution before the annual meeting of the association and in between times to forward a copy of this resolution to the Canadian Government. You see the executive committee did not want to take upon itself to bind the association and so they referred it to the annual meeting. The annual meeting took place in July of 1968 where again the matter was considered. Reading from a memorandum drawn up by Professor Hodgins, the chairman of the policy committee, as to what took place at the annual meeting, he said—

We had a very lengthy and penetrating panel on the matter of Bill S-5. We had very learned and constructive arguments on both sides presented to us. The policy Council was called upon to translate this discussion into some kind of action.

Now the policy committee met on October 26, 1968, and by that time I had been elected at the annual meeting as chairman of the Human Rights Committee, and so I submitted the matter to the policy committee for discus-

sion, and a lively debate took place there. We had representatives from Halifax to Vancouver at this policy committee meeting, and after reviewing all considerations, and despite the expression of some apprehension by several delegates about the possible infringement of free speech, a resolution was adopted reaffirming the firm support of the principles outlined in the bill as expressed in the resolution adopted by the National Executive Committee on March 30 of 1968. So that as a result of this sequence of events the resolution, which I read in full as having been adopted by the Executive Committee, was reaffirmed at the annual meeting, and then reaffirmed again by the Policy Committee, so it is definitely the policy of the United Nations Association of Canada.

I might perhaps at this time say that we felt we were not alone as an all-Canadian association in supporting and recommending the adoption of this legislation, because I recall having read in the literature on the subject, the history of these various proposals—and you will remember that Parliament was adjourned twice—that other public bodies in Canada have likewise supported this legislation. I refer to the unanimous resolution of the Ontario and Manitoba Legislatures, the resolution of the Canadian Federation of Mayors, that of the Canadian Bar Association, the Manitoba Bar, the York County Lawyers' Association, and at least three religious organizations, the Canadian Baptist Federation, the United Church of Canada, and the Anglican Bishops of Ontario.

The Chairman: Have you the actual resolutions passed by these bodies?

Mr. Justice Batshaw: I am afraid I have not them in my file, but I would be glad to submit them to the committee.

The Chairman: Will you do that, please?

Mr. Justice Batshaw: Yes.

Senator Aseltine: We would like to see the full texts.

The Chairman: Yes, we would like the actual texts of the resolutions.

Mr. Justice Batshaw: I will be glad to make them available to the committee.

I thought you might be interested in having recalled to you where this type of legislation fits into the international law, to what extent

other countries have adopted group libel legislation, and to what extent the United Nations has dealt with it.

A good starting point is to refer to the International Convention on the Elimination of All Forms of Racial Discrimination, that was adopted by the General Assembly on the recommendation of the Human Rights Committee in December, 1965. That Convention was signed by 58 countries, and has since been ratified by 27. A twenty-seventh ratification was received in December, 1968, and this is a convention which has now come into force because of the twenty-seventh ratification, which was the minimum required.

This Anti-racial Discrimination Convention contains two clauses which deal specifically with the problem before this committee in studying Bill S-21. The first of these clauses is Article 2(d) which states:

Each state party shall prohibit and bring to an end by all appropriate means, including legislation, as required by circumstances, racial discrimination by any person, group or organization.

So, that is "prohibit and bring to an end racial discrimination by all appropriate means, including legislation".

Then Article 4 of that Convention states:

State Parties condemn all propaganda based on race superiority...or which attempts to justify or promote racial hatred...and shall adopt immediate and positive measures designed to eradicate all incitement to such discrimination.

You see that the actual words used there are similar to those in this legislation. Incitement is what is condemned.

In introducing the question of international consideration of this, perhaps I overlooked the Genocide Convention, since the first part of Bill S-21 deals with genocide.

The Chairman: Just before you leave that, your lordship, would you tell us what significance there is in the fact the convention has now come into force because it has been ratified by 27 countries?

Mr. Justice Batshaw: Well, the convention, if my memory serves me aright, has an enforcement provision in the creation of a committee that shall deal with violations. It is not very effective; it is as effective as they could have passed at the time, but it does

provide consideration of violations by a committee.

Canada has not yet ratified this convention because, as you are all aware, of course, it presents constitutional problems with the provinces. About 18 months ago, the Prime Minister, in anticipation of possible ratification by Canada, consulted with the premiers of the provinces to see which parts of it might come into provincial jurisdiction and which into federal jurisdiction, in order to arrive at a consensus that would permit Canada to ratify this convention which has already been signed. The Canadian representative at the United Nations, Mr. Tremblay at that time, has urged that we in Canada should ratify this convention.

The Chairman: Thank you, your lordship.

Mr. Justice Batshaw: In addition to the United Nations Convention on the elimination of discrimination I think it is interesting to note that the Consultative Assembly of the Council of Europe dealt with this matter in Strasbourg in January, 1966, and adopted a resolution that deals specifically with the problem. The resolution is entitled: "Measures to be taken against incitement to racial, national and religious hatred", and in order to save time I will read some of it only. The resolution which was adopted unanimously on January 27, 1966, reads as follows:

The Assembly.

1. Considering that the aim of the Council of Europe is to achieve greater unity between its members, in observance of the rule of law and of fundamental human rights;

2. Considering further that Article 14 of the European Convention of Human Rights stipulates that the rights and freedoms set forth in the Convention "shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin...";

3. Noting that scattered but increasingly numerous elements in member States, abusing the personal freedoms guaranteed by national constitutions and by the European Convention on Human Rights, are attempting to incite...

Again there is that word "incite".

...the public, in particular young people, to racial, national or religious hatred by

means of political and quasi-political organizations, activities and propaganda, in some cases under cover of education given in schools and universities;

4. Believing that such abuses are gravely prejudicial to international understanding and, above all, to those values which form the essential part of the common heritage of the member States of the Council of Europe;

5. Recalling that the "Declaration on the Elimination of all forms of Racial Discrimination" adopted by the General Assembly of the United Nations on the 20th November, 1963...

That is a declaration which preceded the Convention of 1965, of which I spoke.

...states that all incitement to or acts of violence, whether by individuals or organisations, against any race or group of persons of another colour or ethnic origin shall be considered an offence against society and punishable under law and calls upon all States to take immediate and positive measures, including legislative and other measures, to prosecute and/or outlaw organisations which promote or incite to racial discrimination, or incite to or use violence for purposes of discrimination based on race, colour or ethnic origin;...

It can be seen that that particular clause goes far beyond this particular legislation, because that clause was intended to outlaw organizations. The resolution continues:

6. Addresses a solemn appeal to all Europeans, and especially to the legislative governmental, judicial and educational authorities of member States to take appropriate measures, if necessary of a legislative nature, to eliminate such abuses and to ensure particularly that their youth are brought up in respect for the rule of law and the dignity of every human being, regardless of race, religion, nationality or ethnic origin;...

In conformity with this resolution a number of countries have already adopted legislation of this type. I will list the first nine European countries that have adopted this type of legislation, and they are Austria, Denmark, West Germany, France, Greece, Italy, Norway, Sweden and Britain. So far as Great Britain is concerned the statute is the Race

Relations Act, 1965. In addition, Australia, India, and Turkey have also adopted this type of legislation.

I want to refer to the covenant on civil and political rights which was adopted in December, 1966. You will recall that the United Nations at its inception in 1945 aimed at an international bill of rights, and they started with the universal declaration in 1948, and it then took them some 15 or 16 years to elaborate the two covenants which would put teeth, as it were, in the implementation of the terms of the Universal Declaration. These two covenants were adopted in December, 1966, and one is on Economic and Social Rights, and the other is on Civil and Political Rights. In the Covenant on Civil and Political Rights there is an article which states that any advocacy of national, racial, or religious hostility that constitutes an incitement to hatred and violence shall be prohibited by the law of the state. Again, you see that incitement is an ingredient of the offence.

As we said in our United Nations resolution, we consider that as we have subscribed to the Universal Declaration of Human Rights, and we have ratified the Genocide Convention, and we are considering ratification of the Racial Discrimination Convention, it is only logical that if we find a loophole in our own domestic legislation we should block it in order to make these international commitments of Canada effective. That is precisely what the Council of Europe said in their resolution that I read, that states should give effect by way of ancillary legislation to these provisions.

It is true that the mere adoption of the legislation in itself is a strong educational measure. I would be the last one to underplay the effect which education has, but the legislation in itself helps to educate people. If this is to be an offence on the statute books then there must be a reason for it, and that makes people think before they go ahead and break the law. But, education alone is not sufficient, and it should be, in our submission, supplemented and complemented by legislation on the statute books.

I am not going to deal with the question of infringement of the right of free speech any more than to say that all of us who are deeply interested in the preservation of free speech as a fundamental freedom from which many others flow, after due reflection, are strongly convinced that this is not a challenge

to, or a limitation of, the right of free speech, in that it seeks rather to limit the abuse of free speech by according protection to minority groups.

There are to be found in the legislation a number of safeguards, with which the committee is undoubtedly familiar, because you have studied this legislation and I know it has been explained to you by officers of the Government that there are sufficient safeguards in the legislation so as not to constitute a limitation of free speech. I can assure you that Professor Humphrey, who has devoted a lifetime to human rights, and others who are deeply committed to the cause of protecting human rights and fundamental freedoms in Canada, would not support the adoption of this legislation if they felt it constituted an infringement of the rights of free speech.

I want to give an instance dealing with a problem that I am sure is uppermost in the minds of the committee: is this legislation really necessary? In my own experience—and I was at the Bar for 25 years, and have been for nearly twenty years on the bench now—I have seen several instances in which I felt legislation like this would have done good. I want to cite to you a case that came up in the Quebec courts in 1915. It was the case of *Ortenberg v. Plamondon* in Quebec City. It is reported in 24 Kings Bench Reports at pages 69 and 385. Mr. Plamondon was a notary who delivered a scurrilous speech denouncing the Jewish people and the Jewish race, accusing them of all sorts of nefarious practices.

Senator Aseltine: What year was that?

Mr. Justice Batshaw: In 1915.

Senator Aseltine: Have you not got something more up to date than that?

Senator Croll: He probably has a point on it.

Mr. Justice Batshaw: I can't give you something more up to date, but the point is that here is an instance of an actual case and the law of Quebec has been laid down in this case by the Court of Appeal; it has never been changed and is the law today. The question is, if that law is inadequate is it up to us to advocate an improvement? That is, I think, what we are all after. It is true that I do not know of any more recent decision of the Court of Appeal, but it is the law of the province today.

The Chairman: And nobody has disputed it?

Mr. Justice Batshaw: No, it has never been disputed since.

The Chairman: There is no appeal to the Supreme Court of Canada?

Mr. Justice Batshaw: No appeal to the Supreme Court of Canada.

Senator Aseltine: Have there been any similar cases?

Mr. Justice Batshaw: No, there have not been similar cases because nobody has wanted to take it to court. You know you would lose right away, because whenever the Jews as a group, or the Jehovah Witnesses for that matter, have been defamed and gone to a lawyer to ask whether they have any remedy they have been told, "No, you have not. The Court of Appeal says you have not." That is why it is hoped by all who support this legislation that if the Criminal Code is amended to include...

Senator Aseltine: Does not the legislation we are now dealing with provide that there must be violence before there is any offence?

Mr. Justice Batshaw: There must be an incitement to a breach of the peace so that there is an incitement to violence, I think. The idea is to prevent violence at the outset.

Senator Aseltine: Would not the present Criminal Code cover that?

Mr. Justice Batshaw: Not in the case of defamation of a group. It will protect an individual from criminal libel, but it will not protect an individual—and I think that is the loophole—the legislation is intended to cover.

In the case to which I referred, the man Plamondon made a defamatory speech. Shortly afterwards some youngsters broke the windows in the home of a dentist, Dr. Ortenberg, who took action. The Superior Court dismissed his action, saying that there was no recourse. In the Court of Appeal it was held that he did have a recourse because in the City of Quebec there were only 75 Jewish families in a population of 80,000, and when there was defamation of Jews he was sufficiently identified to have a recourse. In fact, it was his windows that were broken. In the course of rendering judgment, Mr. Justice Carroll said specifically:

Sans doute, que les attaques contre une race, quelques violentes soient-elles, ne

peuvent donner ouverture à une action en dommages-intérêts; tous ceux qui écrivent peuvent écrire tout ce qu'ils pensent sur le compte d'une collectivité, avec cette restriction que si l'un des individus de la collectivité est visé spécialement par la diffamation et subit un dommage, il a l'action en justice.

If I might give honourable senators a rough translation, it would be:

Without doubt, attacks against a race, however violent they may be, do not give rise to an action in damages. Those who write or who might write everything that they think about a collectivity can do so without restriction unless one of the individuals of the collectivity is the specific target of the defamation, and then he has an action in damages. It is clear that it is the law of Quebec that in the case of the defamation of a race or a group there is no recourse in damages.

I think according to the intention of this legislation, by summary conviction these boys might have been fined \$5, \$10, \$15 or \$25 as the case may be, but there would have been a recourse and a sanction.

You ask for a more recent case. I remember in the twenties, in the Jewish community in Montreal there appeared a series of weekly or monthly newspapers published by André Arcand, the Fascist leader, containing very scurrilous material, libelous and defamatory, and a number of us got together, thinking that surely there must be some protection in Canadian law from vicious attacks of that nature. After examining the law, however, we found there was not any. I remember we consulted with Peter Bercovitch, K. C., then a member of the Quebec Legislature, asking him whether something could not be done. We were thinking in terms of perhaps being able to get an injunction, but on the basis of the law as it then stood and as it is now—there has been no change to my knowledge—we had no protection.

You may say to me, "Well, you have survived none the less." I think however that the danger is that attacks of this nature against Jehovah's Witnesses, against Jews, against negroes, against any identifiable minority group, if allowed to continue without any restriction or restraint, help to create a climate of opinion which, perhaps due to other circumstances of economic depression and other

controversies extant, will build up a state of affairs that can be explosive and dangerous.

I submit to you that it is worth considering for the legislators of this country as to whether there should not be a restraint that will stop this head of steam building up, the danger of it building up. The time to deal with it is before it does so and that is why I submit to you that I consider it important. I remember the story told about this kindly old lady in Germany. When she first heard what was going on in the gas chambers she said, "My, my, my, I am sure the Fuhrer does not know about this." This thing had build up in Germany it unfortunately is a classic example of history where defamation against a minority group was allowed to build up to where it caused the holocaust of which you gentlemen know. Thank you very much.

Senator Eudes: When you referred to the law of Quebec were you talking about the Civil Code or the statutes of Quebec?

Mr. Justice Batshaw: I would say the law of Quebec is covered both by the Civil Code and by the statutes. In other words, the Civil Code is the only protection against defamation of an individual and hopefully, to a group. This would be Article 1053 which says that each person is responsible for the damage he causes to another.

When you go and leave the Civil Code and go into the Quebec statutes, which is the other source of our law, there is nothing in the statutes that affords protection that I know of.

Senator Choquette: But, the case that you just quoted was purely a civil case against Plamondon, but then, that man said because of the statements that were made against it, Jews in general were small in number. In the City of Quebec they said, "We will get after him for damage caused to my property," so that it was purely a civil action.

Mr. Justice Batshaw: I do not think it was damage for property.

Senator Choquette: What kind of damage was it?

Mr. Justice Batshaw: It was damage for defamation, "dommages et intérêts". It was damage for libel, damage to his reputation. I just mentioned the windows because it is apropos of this legislation, which deals with

inciting to a breach of the peace and in this case there was a breach of the peace, but he sued for nominal damages.

Senator Choquette: I did not have all the facts.

Senator Prowse: Would it be correct to assume that in that action the fact that there had been damage to his property may have helped him to establish that he was a person identified in order to lay the foundation for the civil claim?

Mr. Justice Batshaw: I would be inclined to agree with that. That would have been one of the elements that served to identify him since these rowdies, having heard the incitement said, "You are one of those fellows."

Senator Prowse: In other words, they identified him by their criminal action?

Mr. Justice Batshaw: Right. The other ground that influenced the court was where the minority was so small in a large group. In Mr. Justice Carroll's judgment he said the larger the group defamed the less chance there is of recourse, because the damage becomes so diffused.

Senator Eudes: That was a civil case.

Mr. Justice Batshaw: That was a civil case. It went to the King's Bench in Quebec. Since the Jews as a group do not exist as a legal entity that could sue, you see, any one person suing is part of a large collectivity and he has no standing before the court.

Senator Prowse: He has to bring himself out of the collectivity and then appear before the court as an injured individual.

Senator Eudes: In other words, he has to prove that he has suffered personal damage.

Mr. Justice Batshaw: No, he does not have to except as a member of the collectivity, because in libel you do not have to prove—you can prove real damages if people have not come to your store to buy and you can prove exemplary damages or general damages which are not specific, but which cover you for your humiliation etc.

Senator Eudes: Not as a member of the collectivity.

Mr. Justice Batshaw: Under the present law you would have to prove that you were identified by the man that defamed you, but unless you can prove identification then it is just as a collectivity no action lies.

Senator Prowse: Going back into the question that has been raised—a case you referred to was in 1915 and it is out of date. My recollection is that a great many of our principles of law were laid down by much earlier decisions. I have in mind the *Hodge* case which sets out the law on circumstantial evidence. This was early in the nineteenth century, and the *Six Carpenters* case which I think was early in the seventeenth century, which set out the limitations of the searches that could be carried out under a search warrant. It occurred to me, sir, that dealing with this question concerning the reliability of older decisions, you might be able to give us some examples of cases where principles of law which govern the conduct of our courts and behaviour today to have rather old beginnings.

Senator Croll: There is a limit to this.

Mr. Justice Batshaw: Perhaps I could say what Dean Pound said. "The law should be stable, but it must not stand still". The element of stability comes to us from these many decisions out of the past. That is what Tennyson called building up from precedent to precedent over the centuries. At the same time I think the law must adapt itself to new special conditions, considering today that mass media being what it is, is something that never existed in the old days. You see, this one man speaking in Quebec City, his words got around only that "patelin" or town or area where he spoke, but today a libel or defamation with modern mass communications has a much more virulent effect. That is why I feel we are on safe ground in recommending to the committee that the law be updated to take into account modern conditions, modern communications and to afford a protection to a minority group. It is perhaps difficult for a member of the majority to really feel this. You know there is a greater feeling of security as a member of the majority group and it is the ethnic group that worries when they are attacked and they are sensitive to it. To me it is almost part of the welcome that Canada should offer to the newcomers to say that you do not have to worry because you are a Ukrainian or a Finlander or Italian, or from any other part of the globe, that our law protects you from false accusations not from the truth.

Senator Hollett: Does not our law protect them against that now?

Mr. Batshaw: Only to a limited extent.

Senator Hollett: I know, but the more laws you have on any matter the more trouble is going to be caused and the more cases in court.

Mr. Justice Batshaw: That is of course open to debate. Do not forget this. It is interesting to note that the members of the judiciary who have spoken on this—such as Chief Justice Gale of the Appeal Division of the Ontario Supreme Court, and Chief Justice Wells of the Trial Division of that Court and Mr. Justice Fortas and Mr. Justice Black in the United States—are in favour of such laws.

The Chairman: Can you give those quotations, in due season?

Mr. Justice Batshaw: I will be very glad to do so. The task of the judiciary is to protect the citizen, and if a man is falsely accused he can avail himself of several defences. He can plead truth, that the subject matter is true, or that he believed it to be true or that it is in the public interest.

Senator Aseltine: You want to make it a criminal offence, so that he can be sent to jail.

Mr. Justice Batshaw: Not unless he has broken the law—which in the opinion of Parliament should be enacted. I am not afraid that we have too many laws. That is a philosophical question, as to the extent to which one should have laws. I have given examples where it would be in the interests of the Canadian people to make it an offence to incite to hatred, which would lead to a breach of the peace.

Senator Aseltine: Even though there is no violence?

Mr. Justice Batshaw: Even so, If we are to wait until violence takes place—I would say an ounce of prevention is better than a pound of cure.

The Chairman: Can you give some examples of legislation of this nature in the United States?

Mr. Justice Batshaw: I cannot give at the moment a resumé of the group libel laws in the United States, but I will be glad to do so in the supplementary material I will prepare for you.

The Chairman: Thank you.

Mr. Justice Batshaw: A leading case in the United States was decided by the Supreme

Court in 1951—*Beauharnais v. Illinois* and it ruled that group libel laws are constitutional. I quote from the judgment of the Supreme Court of the United States, dealing with free speech:

Free speech is not an absolute right in all circumstances. It must be accommodated to other equally basic needs of society, one of which is society's interest in the avoidance of group hostility and group conflict. A communication does not enjoy constitutional protection merely because it may express an opinion. If it is essentially designed to stir up ill will and is fraudulent, it is not in a constitutional sense an effort to communicate ideas and is therefore subject to the police power of the state. Since society gains little or nothing by group defamation, its interest in avoiding the embitterment of group relations outweighs the abstract right of freedom of expression. Racial defamation is "like a slow cumulative poison, the effects of which may not be visible for years" and racial defamation cannot be overcome "merely by counter-propaganda."

That is an authoritative pronouncement.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: What was the nature of the case? Did it involve the validity of state legislation?

Mr. Justice Batshaw: Yes, it was a case of Illinois legislation which came up before the Supreme Court. I have the reference here. I will put it in my memorandum. It is 1951, the United States Supreme Court and is reported in Volume 343 U.S. Reports at page 250. Then also on the American picture, in *Yates v. The United States*, 354 U.S. Reports, 298 in 1956, the court rules that the First Amendment protects advocacy of even the most hateful of ideas so long as there is no incitement to unlawful action—that is part of the ingredients of the Canadian bill—but once there is incitement to unlawful action, then it is illegal in the United States.

Mr. Hopkins: I do not think the Canadian legislation uses the word "incitement".

The Chairman: The meaning is there.

Mr. Justice Batshaw: I think it does in section 267B.

(1) Every one who, by communicating statements in any public place, *incites*

hatred or contempt against any identifiable group...

It is precisely that which is one of the main ingredients of the offence.

Recognizing the requirement of incitement, some bills, such as the Pennsylvania bill, use the term "incitement to hatred". That is exactly the term we use. In Pennsylvania the wording is identical to that contained in Bill S-21.

Senator Choquette: But you see how easy it is for an accused to be brought to court, or a man who is supposed to have broken the law. Let us say that in a public place in Toronto he speaks to a gathering of about 25 to 30 people who do not take him very seriously. Then suppose you have 5,000 of the Jewish faith who go there and say, "We do not like what he is saying" and then a big fight starts. Who started the fight but the 5,000 Jews? They might say, "He was inciting hatred and was saying half or whole truths. We did not like that, and that is why we started fighting."

Senator Prowse: How did the 5,000 Jews get there?

Senator Choquette: Well, let us put it at a thousand or 2,000.

Senator Prowse: Even a thousand, how did they get there?

Senator Choquette: They got there because they knew there was going to be this meeting.

Senator Prowse: And knew what he was going to say?

Senator Choquette: No, they found out what he said when they got there and started a fight. I am putting a hypothetical case to you.

Mr. Justice Batshaw: I would have two answers to that. I would say that after this legislation hopefully is adopted there will be less likelihood of a group of 5,000 representatives of the attacked group who would go down there and start a fight. They would know this man had committed a breach of the law. They would know there is legal recourse, and somebody present, perhaps a police officer, would lay a charge against this man. If what he was saying was not incitement to hatred likely to lead to a breach of the peace, then he would be acquitted, but these people

would not be permitted to take the law into their own hands when the law provided them with redress. That is point No. 1.

The Chairman: In other words, you want to substitute the rule of law for the rule of the mob?

Mr. Justice Batshaw: Precisely. The other answer is that an individual who addresses a group in a public place is not allowed to say things which will stir up others so that there is going to be a fight, because that is a breach of the peace. The Queen's peace has always been held sacred in the English law, and you are not allowed to start fighting or to break the peace. So, he would be committing an offence, and the proof that it was so is that this group started to fight with him. Who started the fight? The mere starting of a fight is illegal—the mere saying of things that will start a fight. There are certain provocations that are so violent that human nature reacts to them with violence, and it is an offence, in law, to create that kind of provocation in a public place. So, I think on both grounds this legislation would be desirable.

Senator Choquette: I still think the group who went there to start a fight is the one really that should be found guilty, and not a poor fellow who is a crackpot and tries to address a meeting of 20 or 10 who do not take him seriously.

Mr. Justice Batshaw: We know that if there were compliments there would not be a fight, but I daresay they are as guilty of a breach of the peace as the man who incited them; they have to show restraint too.

Senator Choquette: That happened in Ontario.

Mr. Justice Batshaw: I remember the Allen Gardens incident.

The Chairman: Would you mind telling us the significance of the Quebec decision in the law of the other provinces? What significance has that case now in Ontario, for instance?

Mr. Justice Batshaw: I will beg leave not to answer because I know little enough of Quebec law, and I would not be the one to try to tell you what its comparative effect would be.

Senator Choquette: It is not binding on the other provinces.

Mr. Justice Batshaw: No.

The Chairman: But it is quoted in the other provinces.

Senator Prowse: Let me give you a specific situation. Suppose somebody made a speech about Jews in Edmonton, where I imagine there are about 2,000 or 2,500, or in Montreal, where there are, what, 50,000?

Mr. Justice Batshaw: 125,000.

Senator Prowse: Or whatever it is, then the rationale would be that that case could hardly be applied to the Edmonton situation and certainly not to the Montreal situation.

Mr. Justice Batshaw: There would be no recourse.

Senator Prowse: They are affected merely because they are a small number of people and they are identified in the public mind.

Mr. Justice Batshaw: Yes.

The Chairman: Your lordship, you have certainly given us a most comprehensive...

Senator Eudes: Just before you conclude, Mr. Chairman. In what year was this decision in Quebec rendered?

Mr. Justice Batshaw: In 1915.

Senator Eudes: You have mentioned that in other countries—Austria, France, and so forth—similar legislation has been passed. Would you be in a position to say at what time and if similar legislation to that included in our bill was put in a special statute or added to—well, I do not suppose they have a Criminal Code; and if the conditions prevailing at the time in those countries were similar to those prevailing today in our own country?

Mr. Justice Batshaw: Well, I will tell you what I will be glad to do. I will be glad to file with the Chairman a booklet called *The Crime of Incitement to Group Hatred*, which was a survey of international and national legislation prepared by Natan Lerner, an officer of the World Jewish Congress in New York, and he has listed there countries, and I will just, for the sake of the immediate record, give you a few of them.

LATIN AMERICA ARGENTINA

On October 30, 1964, the Chamber of Deputies gave its definite approval to a law amending the Penal Code.

That dealt with organizations to conduct propaganda based on ideas or theories of superiority of one race or of a group of persons of a given religion, ethnic origin or colour. It varies a little bit—those who incite to violence by the mere fact of inciting, and so on. Brazil passed its legislation in 1963, Chile in 1963, and Uruguay in 1964. This one reads: "He who publicly arouses, orally or in writing, hatred or contempt against persons of a given race, colour, religion or nationality, for reasons of such a nature, will be punished by imprisonment for 2 to 4 years". You will note that the word "religion" is there.

Senator Eudes: Let us not take up the time of the committee...

Mr. Justice Batshaw: No, but it is all fairly recent. I would say it is all from 1960 on.

Senator Eudes: I would like to know if it is in a special statute, or is it in the criminal law of those countries?

Mr. Justice Batshaw: In England it is a definite statute, the Race Relations Act. In some of these other countries it is by amendment to the penal or criminal code. In India it was by amendment to the penal code.

The Chairman: Of course, in England they do not have a criminal code.

Senator Eudes: You mentioned international law, but we are not dealing with international law but with the criminal code.

Mr. Justice Batshaw: International law in that sense has to be divided into two categories. There is the law adopted by international organizations such as the United Nations, and the Council of Europe, and then there is international law in the sense of the law of other countries throughout the world—in other words, where this type of legislation fits into the law of other countries or states throughout the world as opposed to international agreements like the racial discrimination convention, and so on. So, they are both included—the domestic legislation of other countries, and the decisions of international bodies such as the United Nations or the Council of Europe.

Senator Fergusson: There is one thing that puzzles me in section 267B, and perhaps you, as a member of the bench, will be able to satisfy me. I cannot understand how you are

going to decide that a statement which incites hatred or contempt against any identifiable group constitutes an incitement that is likely to lead to a breach of the peace. If it has not already done so, how are you going to know it is likely to do so? It seems to me that this is a problem.

Mr. Justice Batshaw: Let us take an extreme example. Suppose a speaker says: "One block from this park in which I am speaking is a brickyard. I urge you gentlemen to go down to that brickyard and each take a brick, and break a window in the first house you see that belongs to a Jehovah' Witness? That is an extreme case, and that is an incitement to violence.

Senator Fergusson: I can understand that case, but...

Mr. Justice Batshaw: If, on the other hand—to take the other end of the scale—the speaker simply speaks philosophically and gives his opinions and says that he disagrees, and that one should not believe what they believe because they are wrong and misguided, and they are making a terrible mistake; even if he denounced their views in strong and violent language, he would be blameless so far as the criminal law is concerned.

In between those two cases I admit you will get cases that are difficult, but that is what the law is about all the time. The clear cases do not come to court. It is the difficult ones that the courts have to deal with. Of course, you will have the general principle of the criminal law to guide you. The accused gets the benefit of the doubt.

Here, I am thinking about the Divorce Act which I am administering now, and by way of parenthesis I want to thank you, honourable senators, for having conferred a boon upon humanity by sponsoring that legislation and seeing that it was passed by Parliament. We have had cases of people who have been living in a common law relationship for 15 and more years, and who have five and more children, who have suddenly been enabled to get a divorce, remarry, and become respectable members of the community, and have their children legitimized.

In that legislation you left the decision as to what constituted mental cruelty to the discretion of the judges. You can have a clear case of mental cruelty, and you can have a case which, to use your words, is "hard to define, but easy to recognize".

The Chairman: Yes.

Mr. Justice Batshaw: Perhaps that is true of this. When you hear a speech you can form a pretty good idea of whether it would incite people to be violent, or not.

Senator Choquette: Do you not think, sir, that if we pass this type of legislation the door will be opened to trials that might last for months. I have in mind the example I gave in the chamber when I spoke on this bill the first time it was introduced. I had in mind a case that took place in the early thirties right here in the town of Eastview, next to the City of Ottawa. A woman who was working for a company in Waterloo or Kitchener sold contraceptives from door to door, and she was prosecuted under the appropriate section of the Criminal Code.

Mr. Justice Batshaw: I remember the case very well.

Senator Choquette: Here we have a similar clause. Suppose you can show the truth of the statement? Suppose you have somebody saying: "I am going to test this law, and in that way I shall obtain more publicity than I would if I spoke to a small group in Queen's Park in Toronto. I am going to make this trial last for two months by calling all sorts of experts to show the truth of my statement." He then gets all the publicity he wants in the newspapers of Canada, and he wins his case. So, what have we gained by passing this law, and what has the group that wants us to pass this law gained?

Senator Hollett: It has caused more trouble.

Senator Choquette: Yes.

Mr. Justice Batshaw: I would answer that in this way. I would say that the danger of an individual's using the law as an instrument to gain publicity and to continue his defamation is not a sound criterion upon which to fail to adopt the law. That is one of the risks of our democratic society. If the law can be used in such a hypothetical manner, then it might be that there is less harm in having it so used than not to have the law. In other words, the criterion of fear of having it abused for other purposes is not sufficient to prevent you from adopting the law.

Secondly, I would say it is much more likely that such a person would lose his case. As an example I would take one of the outstand-

ing libels against the Jewish people, namely, that they use the blood of Christian children at Passover for ritual purposes. Can you perceive of anyone getting up in a court of law and trying to prove that. If a person tried to prove that, or something like it, then there is much more chance...

Senator Choquette: But one who wanted to win his case would not use such nonsense. You know that.

Mr. Justice Batshaw: At any rate, if it is not true there is much more chance of the falsity being exposed at the trial, and that that person will end up by being discredited.

Senator Choquette: I went on to say that the trial of the *Palmer* case lasted for two months, and philosophers, theologians, ministers, priests and everybody else gave evidence, and the case then went to the Court of Appeal, and I think it ended up in the Supreme Court.

Mr. Justice Batshaw: I think the net result of the *Palmer* case was good for Canada because here we are 20 or 25 years later with a bill now before the House of Commons that deals with that very problem. I think public opinion was educated by that long trial that took place, and which sowed the seeds of ameliorative legislation 25 years later.

Senator Prowse: Mr. Chairman, Senator McCarthy, during the hearings of the witch hunt they had on Communism in the United States, my understanding and recollection is he received a great deal of publicity until the Senate or a Senate committee decided to have a public trial and an investigation of his charges. The result of the public trial and investigation of those charges was not the destruction of the people he was after or pretended to be after, but of the senator himself who was making the unreasonable accusations.

Mr. Justice Batshaw: I would certainly agree with that. There is a good maxim for that. "If you let light into a rat hole it will cease to be inhabited by rats."

Senator Prowse: May I ask two questions that have to do with the bill we have, sir?

The Chairman: Yes.

Senator Prowse: It has been suggested that genocide as referred to in clause 267A makes it an offence for a person to advocate the

destruction in whole or in part of any group of persons. A "group" is unqualified. Then we have in clause 267B the following:

...hatred or contempt against any identifiable group...

And then in subsection 5, paragraph (b) "identifiable group" is defined. Do you feel that it would improve the bill or lessen its usefulness if we were to import into clause 267A the word "identifiable" before "group" so that we use the same wording? In other words, in all of the sections, we would refer to identifiable groups rather than have one section refer merely to group whereas the other one deals with identifiable group, which is then defined. Then the second question is regarding the definition of identifiable group. I will deal with that separately.

Mr. Justice Batshaw: Yes, I think it would help and be more specific. I think that what happened here perhaps is the wording of all the subclauses of section 267A are based on the genocide conviction which did not use the word "identifiable". It may be open to question whether by putting in "identifiable group" you are restricting the word "group", because "identifiable group" means one distinguished by colour, race, or ethnic origin. Sex is not in there. God forbid someone should say, "Let us kill all the women." because sex is not included in the definition of an identifiable group.

Senator Choquette: I think we are agreed in all our discussions that the word "religion" should be added.

Senator Prowse: That is the second part. Subparagraph 5(b) does not include the word religion.

Senator Choquette: That is right.

Senator Prowse: I think there is a general feeling, at least among a number of persons listening to evidence, that this perhaps is an oversight.

Mr. Justice Batshaw: I am strongly of the opinion that it would be useful and constructive to add the word "religion".

Senator Choquette: Add it.

Mr. Justice Batshaw: It would eliminate this haziness of the conception of "ethnic". Let us not ignore the fact that the religious element in discrimination is a very strong one. You

know this book by Jules Issac L'enseignement du mépris. He has written a book, this great historian of France, to point out that in so far as Jews are concerned the religious roots of anti-Semitism are the strongest. That is why somebody asked in one of the earlier hearings why should not the French Canadian group seek protection against defamation as a minority in Canada. They do not belong to a minority religious group. There may be a differentiation between Protestant and Catholic, but they are all Christians. As a religious minority, adding the word religion makes the group so much more easily identifiable and attacks a source of discrimination. I would strongly urge and am firmly of the opinion that adding the word "religion" would be a constructive addition.

Senator Prowse: At the present time, as this stands, a person could say anything he wanted to about Roman Catholics, to be very specific, and there would be no protection for them and the abuse could be just as insulting and irresponsible as any of the things we have heard about smaller groups.

Mr. Justice Batshaw: Right.

The Chairman: Now, we have got some more witnesses.

Senator Fergusson: May I ask one question. I would like to ask Mr. Justice Batshaw if, from his own personal knowledge, he feels that this legislation is needed and whether there is enough of the hate literature being circulated now to make this legislation necessary?

Mr. Justice Batshaw: I would answer in the affirmative, definitely. I think that every few months or so we receive in the Congress Bulletin a notice of the fact that in one city or another, frequently Toronto, literature of this type is being circulated. You know this business about the telephone...

The Chairman: We know it well.

Mr. Justice Batshaw: It shows that there are groups who are injecting this poison and it does exist.

Senator Fergusson: Is it against anyone other than the Jewish people? Do you know of such literature being circulated?

The Chairman: Negroes.

Mr. Justice Batshaw: Yes, Negroes. There have been against Negroes and others, which

are not so vocal perhaps in getting themselves defended and organized to try and combat it. I know there has been against Negroes.

Senator Fergusson: Mr. Saul Hayes, when he was here, stated that we need it on account of the feeling in North America between the whites and the Negroes, but I want to know if that is your opinion too.

Mr. Justice Batshaw: Yes, I am definitely of that opinion.

Senator Hollett: Does it do any harm?

Mr. Justice Batshaw: I cannot really conceive that it will fail to. Does this literature do any harm?

Senator Hollett: Yes.

Mr. Justice Batshaw: Yes, I think it does. You can take the example that I gave you of the Plamondon case where this man made a speech and the windows were broken in this chap's house.

Senator Hollett: That is another matter. Does it do harm generally, or does it not do harm to the group who are distributing this stuff? We are supposed to be sane individuals—in Canada at least.

Mr. Justice Batshaw: I tell you not all of it is so far fetched and so crazy that nobody would pay any attention to it. Very often it is a mixture of half truths and quotations taken out of context. The "Protocols of the Elders of Zion" is still being distributed after being exposed as a forgery.

Senator Hollett: It has not intended to make a breach of the peace has it?

Mr. Justice Batshaw: The idea is not to wait until the peace is broken.

Senator Hollett: I remember when I was a young fellow. I was born a Methodist. Somebody called me a name which I cannot put on the record here. Under this legislation I could have taken him to court, but what I did was to punch him in the nose, and I never heard anything afterwards.

Mr. Justice Batshaw: That is a breach of the peace, sir. You could have gone to jail.

The Chairman: We must end this. I want to thank you on behalf of all our committee for a classical exposition of this situation. It has helped us a great deal. You have not only

given us your opinion, but real information. You are going to send us a memorandum. We are indebted to you, sir. Thank you for coming. I speak on behalf of all members of the committee.

Mr. Justice Batshaw: Thank you.

(For text of Mr. Justice Batshaw's memorandum, see Appendix "A").

The Chairman: Now, honourable senators, we have another delegation to be heard. It is the Jewish Labour Committee of Canada. There are three representatives of the organization here, namely, Mr. Michael Rubinstein, Q.C., Mr. Bernard Shane, and Mr. Rafael Ryba.

Honourable senators, you have all received the memorandum, and I hope that most of you have read it. It is signed by Mr. Rafael Ryba, National Secretary of the Jewish Labour Committee. Perhaps Mr. Rubinstein will tell the committee something of its history, the members it represents, and so forth.

Mr. Michael Rubinstein, Q.C.: Mr. Chairman and honourable senators, on behalf of the committee I am really grateful that you have given us the opportunity here this afternoon to voice our opinion on the bill which is before you for consideration.

The Jewish Labour Committee has been in existence for about 35 years and is devoted principally to two objectives. One is to give aid and assistance, both material and moral, to victims of racial persecution, especially in Europe and also in Canada, in the period immediately preceding the last World War and during the war. Its second objective, which has had a more permanent solution, is the struggle for human rights in Canada.

Perhaps I should bring to your attention that our efforts in the field of human rights have been recognized by the Government of Canada and, had I known that you were going to ask us for our pedigree, I would gladly have brought along a publication of the federal Department of Labour which dates back about 15 years, in which the Department of Labour paid the Jewish Labour Committee the highest compliment we could ever expect to receive, and that is that of being among the pioneers in the field of human rights, and ascribed to the Jewish Labour Committee or to its efforts a large measure of credit for the passage of many of these bills on human rights in the various

provinces of Canada. We are continuing this effort, and because of our great desire for the protection of human rights we are here today to support bill S-21.

Secondly, who are we? From the name it is hard to tell exactly what it is, because it has no racial connotation. It is composed mainly of a number of trade unions—I would say, principally the needle trade unions and some others, in which, as you know, traditionally there has always been a goodly number of Jewish men and women, and it is also composed of a number of fraternal orders and associations, what we call *landsmanschaften*, which are societies composed of people from various areas and countries of the world.

It might perhaps be exaggerating but we say in our literature that we represent about 50,000. If you are going to ask me how we counted them, I have to admit that we have not counted them exactly and we did not use a computer. However, when we take the membership of the organizations affiliated to the Jewish Labour Committee the figure of 50,000 is not exaggerated. You have an organization like the International Lady Garment Workers, of which the head is right here, Mr. Bernard Shane, which has a membership in Canada of approximately 25,000, so that 50,000, when you take into account the other organizations, is not too much.

I would also like to add that I am speaking today as one of the officers of a Quebec organization. It is true they have not signed this brief, but I will tell you how I am authorized to speak on their behalf. It is an organization called, in English, the United Council for Human Rights, which is purely a Quebec organization and which is known in French as *Comité pour la Défense des Droits de l'Homme*. It is a very large organization. It takes in a very broad level and pattern of the population of Quebec. It takes in all the Quebec Federation of Labour which has, I believe, a membership of around 225,000 to 250,000. The national unions are affiliated to it, most of which our minister, the Honourable Mr. Marchand, was a member of or president of. As a matter of fact, he and I were together in a committee in Quebec to get some legislation in the field of human rights. They also have a similar number, and I think what is even more important, honourable senators, is that this group is supported by two church groups—the Catholic church has a representative, l'Abbé Riendeau, who comes

directly from the Archbishop's Palace, from the Catholic Action, and the second group is the Church of England, which also has a representative on it, besides Negro groups, teachers, social workers, and so on. They also are behind us, and so I believe this idea of legislation in this field, despite the fact there may be certain doubts—as we all should have doubts when something new comes up, and it is only natural for humans to have some doubts—is being supported by these groups.

I think we have heard, as the chairman has said, a wonderful, very fine and profound philosophical exposé, and also a fine legal and judicial exposé regarding this bill. All I can offer you is a layman's view of this matter, but I will be prepared to answer any questions.

I believe I have dealt with the first paragraph in my answer already. I do not need to read it because it says who we are.

The Jewish Labour Committee immediately prior to and during the Second World War organized aid for the persecuted in Europe and brought relief to many thousands of unfortunate people whose lives were threatened by Hitlerism, including a very considerable number of non-Jews. I think our group has this distinction from other Jewish groups, that our work is not purely in the Jewish field. We feel that we are not only members of the Jewish Community but are also members of the community at large, and that is why we participate in other groups as well.

After the last World War, the Jewish Labour Committee of Canada, in co-operation with our Government, brought succor to refugees in the concentration camps of Europe, and was instrumental in making it possible for many displaced persons to find a new life in Canada.

In submitting the present brief, the Committee recognizes that the Senate Committee has already been supplied with ample evidence of disturbing indications of renewed attempts to foster racial intolerance through the dissemination of "hate propaganda" in Canada and some other countries of the world.

I have brought along a few samples of that hate propaganda. We have here, for instance, one that is published in Quebec in French.

The Chairman: Just tell us about it.

Mr. Rubinstein: It is entitled "The Jewish Program for the Conquest of the World". It is a little bit like the piece about the Elders of Zion, but it is a much cruder copy of it. It tells you that the Jews are responsible for dissensions within the Catholic church by corrupting the young generation and by destroying family life, if you please, spreading vice, prostituting literature, minimizing respect for religion, discrediting as much as possible priests and spreading scandalous stories about them, encouraging criticism in order to settle the basis of religious belief, and provoking schisms and disputes in the whole of the church, et cetera. This was distributed in the Province of Quebec last summer at about the same time that some pamphlets were distributed about Pierre Elliott Trudeau being an atheist and everything else. So, you have that. I have some more examples here.

Senator Prowse: Could they be made exhibits, Mr. Chairman?

The Chairman: I was wondering whether the committee would prefer that these be made appendices to today's proceedings?

Senator Prowse: There is no need to read them into the record if they are to be appendices.

The Chairman: Let us hear what more you have?

Mr. Rubinstein: Here is another one that has the swastika on it and the inscription: "Dirty Jews; the Gates of the Crematorium are open wide for you." This has been distributed.

Senator Choquette: Who signs those?

Mr. Rubinstein: They are unsigned.

Senator Choquette: So the authors could be anybody, even those who want to be looked upon as the persecuted? You know that that is done sometimes, do you not?

Mr. Rubinstein: I know you do not mean it, so do not take what I say personally, but I will tell you that one of the excuses I have read given by certain governments that were instrumental in persecuting minorities, whether Jews or others, was that it was not true that they were persecuting them but that it was the minority itself that was doing the persecuting in order to be able to raise complaints against the majority. That is a little bit far-fetched, because Jews are so busy with

many other things that they have no time in which to spread such propaganda so as to be able to come here and take up the time of a Senate committee. I know that you do not mean that.

Senator Choquette: What I do mean is that we do not know the source or the extent of the publication, and not know who is behind it.

The Chairman: How did this come into your hands, witness?

Mr. Rubinstein: We got this by mail from the National White Americans Party. They are a recognizable group, which has spread a tremendous amount of literature throughout Canada, and especially in the Province of Ontario, within the last two or three years. As a matter of fact, our Postmaster General was called upon about two years ago to try to prevent its coming into Canada. They put out a monthly publication, I believe, and in addition to that they printed a lot of literature which is very much like the Nazi literature, or the literature of the days of Hitler. They attack not only Jews but also Negroes, and also included in the undesirable people, from their point of view, are Jews and Catholics.

I am reading now from a leaflet distributed by the National White Americans Party, and circulated in Canada. . .

Senator Fergusson: Is it signed by the National White Americans Party, or how do you know it comes from them?

Mr. Rubinstein: This came in an envelope from them, and there are also publications that are signed by them.

Senator Fergusson: Does the envelope bear a notation to the effect that it comes from them?

Mr. Rubinstein: They have a post office box number that is known to be theirs. I believe in the Province of Ontario there were two individuals who were very active in disturbances in Toronto a couple of years ago, and they were openly distributing this literature at those meetings that created trouble.

Senator Hollett: If this legislation is passed who would you prosecute?

Mr. Rubinstein: Those who were distributing it here.

Senator Hollett: That would be the Post Office.

Mr. Rubinstein: No. The mail is another matter, but these are also distributed personally from door to door.

Senator Hollett: I thought you said they were distributed through the mail.

Mr. Rubinstein: Some comes through the mail, and I said also that it was distributed at meetings.

This honourable senator, whose name I would like to know. . .

The Chairman: That is Senator Choquette.

Mr. Rubinstein: Yes, I suspected as much.

Senator Choquette, you were asking what happens at certain meetings. Well, these things were distributed, and an excerpt from one of the leaflets so distributed reads as follows:

On the Jewish Question our policy is much stricter. We demand the arrest of all Jews involved in Communist or Zionist plots, public trials and executions. All other Jews would be immediately sterilized so that they could not breed more Jews. This is vital because the Jews are CRIMINALS as a race, who have been active in anti-Christian plots throughout their entire history.

I can file the excerpt, and I can also file the document from which it comes.

Senator Prowse: I have just one question on the matter of distribution. Can you say whether those come in as individual mailings from the United States, or whether they come in in bulk and are distributed in Canada.

Mr. Rubinstein: Both. Some come individually. I received myself at my house about two years ago one of these scurrilous pamphlets, and I am sure you have all received something similar.

Senator Choquette: We threw them away, while you people were gathering them. I do not know who put my name on the list, but I used to receive them regularly at the Senate, and I threw them in the wastebasket without reading them.

Mr. Rubinstein: But, you see, sir, there are some people—last year on the television which is provided by the Government of Canada I saw a program which lasted half an hour, or an hour, on which a certain gentle-

man in Ontario spoke about his hatred of all minorities, especially of Jews. He stated that these racial theories were 100 per cent correct and should be enacted in Canada. It is not something that does not exist. I sometimes get, with all due respect, literature from the Witnesses of Jehovah against the Catholic Church and I do exactly what you do, I throw it in the wastebasket. But not everybody does. There are those in Canada that voted for the revival of Fascism and Nazism. We have such a group in Ontario and a group in Quebec. The newspaper *La Presse* in Montreal gave pictures of their camps. They also have camps in Ontario. We cannot thoroughly ignore their existence.

Here is an excerpt. We have a party in the Province of Quebec called Parti National Socialiste. That is exactly the name of Hitler's Party, the Nationalist Socialist Party. I will file with you, Mr. Chairman, a copy of an article printed in *La Patrie* on July 14, 1968, entitled "The Nazi Ideal is not Dead in Canada". In French, "L'idéal nazi n'est pas encore mort au Canada". This gives quite a description of the activities of that group. This is in the Province of Quebec, but we also have many large groups in Ontario. I also have an excerpt from *Photo-Journal* which is another newspaper in the City of Montreal. This is the weekly edition for May 10 to May 17, 1967. The title is "Néo Nazi, Guy de la Rivière fait parade de son racisme". In English, "We shall bring up the young of Quebec in the discipline of the SS". The SS was the Schutz Staffel, which was, as you know, the army of the National Socialist Party. I will file this with the Committee. There is an article from the Canadian Jewish Chronicle Review of June 16, 1967, entitled "Swastikas painted on six synagogues". This talks about desecration of six synagogues in Montreal in which swastikas were painted. You had the same situation in Ontario, sir.

I am a proud Quebecer and I do not want you to think that we are the only ones who have gentlemen of that sort. They are all over Canada. Now, let me then continue after I have given you some examples. I am prepared, Mr. Chairman, to give you some more.

The Chairman: No. While we are on this question of examples, honourable senators will remember that we had some similar material presented to us by the representative of the Bell Telephone Company and we decided we would not put it on our records.

This, as I scan it, is not perhaps quite as bad, but it is puerile stuff. What we received from the witness is sufficient, in my judgment, without spending money to put this—

Senator Choquette: Do not put it on the record.

Senator Prowse: I think it should be filed, but not included in the record.

The Chairman: Very well. Is that satisfactory, honourable senators?

Hon. Senators: Agreed.

The Chairman: It will be filed, but will not appear on the record. You may file any more material you have.

Senator Choquette: I think we had reached the second paragraph at the top of page 2.

Mr. Rubinstein: There is no doubt that an overwhelming consensus exists in favour of finding an acceptable method of curbing the dissemination of hate propaganda on which intolerance feeds through legislation amending the Criminal Code of Canada. We do not, therefore, propose to reiterate in detail the arguments supporting such action. Our aim is rather to draw the committee's attention to the transparent lack of logic in the arguments against the proposed legislation.

The reason most frequently given by those who oppose laws making the publication of hate propaganda a punishable offence is that such legislation would be the first step towards restricting freedom of speech and freedom of the press. No argument, we are convinced, could be more fallacious.

We deem this rigid view as unwarranted and obsolete, for its underlying assumption rests on a false concept of man in modern society. Unfortunately bigotry and hatred have spread and are spreading far beyond the optimistic limits which opponents of anti-hate legislation had predicted and consequently dependence on man's spontaneous resistance alone is hardly supported by modern psychology.

On the contrary, recent experience has proven that the proclivity of man to be swayed by bias and bigotry warrants maximum alertness and resistance of our democratic society against the destructive impact of hate literature. For that reason measures to protect the basic concepts of freedom, of

equality, of human dignity and a host of similar rights against debasing and corroding attacks are essential for their very preservation.

I think this is really the basis of our support of this bill. We feel that we have something in Canada which is most precious and which not all countries have. We have a wonderful democratic system and we have liberty. The individual has a lot of rights. I look upon it as though this was a beautiful garden which you have in the back or in the front of your house and when you tend your flowers, your plants. Unless we take measures to protect them from kids on the street who would throw stones at them or tear them out of the ground, or unless we protect them against other hazards we are going to lose them. That is really the essence of our argument.

History has proven through countless tragic examples that neglect of these basic concepts—that is to say, not protecting them—far from resulting in increased liberty, has led inevitably to tyranny, totalitarianism, repression, bloodshed and death, with the utter destruction of freedom as our society knows it. In protecting the rights of its members against slander and maliciousness our society protects itself; and abdication of this responsibility towards any group weakens irreparably the very foundations on which our civilization has been so painfully built over the centuries.

Thus, in failing to legislate against the dissemination of literature which preaches hatred and often the elimination of whole ethnic groups, we suggest, is opening the door to abuses which can quickly spread and threaten the institution of democratic government itself. Far from advocating any measure to limit freedom of speech, the outlawing of propaganda which the vast majority of people reject as repugnant beyond belief, is as essential as the laws through which society protects itself from other crimes such as murder, assault, theft, oppression, blackmail and the like.

We would like to make it clear, that what we envisage is preventive legislation designed not merely to have the force of law in specific cases, but also to provide evidence that the conscience of the majority is unanimous in condemning certain actions which are self-evidently wrong in themselves. Moreover, we feel that experience has shown that the very

absence of such laws in this field may actually act as a form of encouragement, thus inadvertently fostering conditions which no one can applaud. In this respect, we would like to make the following observations:

1. Those who tend to scoff at the scope of racial intolerance in this country—and this might answer some of you who wonder whether the situation warrants legislation, and I would like to bring this to your attention, and I know everyone is in good faith—might well recall that Hitler's Nazi movement in Germany began with a group of only seven people and was not taken seriously. In his book, "The Rise and Fall of the Third Reich", Shirer traces the growth of this Movement from a ridiculous handful of fanatics to a power that took over the country, at a time of economic crisis, and subsequently perpetrated the acts of genocide which horrified the whole world. It is clearly shown in the book that the development of a mentality conditioned to accept such atrocities was due to the unrestricted flow of hate propaganda designed to degrade a race of people until they were no longer regarded as human beings and were thus accepted as the natural victims of any form of barbarism.

2. History, and indeed present-day situations, clearly demonstrate that Jews, Negroes and other minority groups seem inevitably destined to be the first victims of such intolerance since hate propaganda is almost exclusively directed against them.

3. The result is that what was unthinkable thirty years ago has to-day entered into the realm of the possible, since genocide was practised on a mass scale in Europe during the Second World War. For example, the slogan "Jews to the gas ovens" nowadays appears in hate propaganda and is even scrawled on walls in Canadian cities. This, we feel, is a warning that, however ridiculous it may at present appear, a neo-Nazi Party in Ontario, Quebec or elsewhere in Canada, nourished by the same ideas which fostered the Hitler regime, carries within it the inherent menace of racial violence and the possible "final solution" of mass extermination.

4. Equally important is the undeniable fact that the continued circulation of propaganda preaching hatred of any

identifiable group poisons the very atmosphere and makes the simple act of breathing freely impossible for those against whom hatred is directed and thus denies the potential victims the most fundamental freedoms.

We would like to draw the honourable committee's attention to some aspects of the question which are particularly applicable to Canada's situation.

As a nation which encourages immigration, Canada yearly receives new citizens from many lands, people of widely different racial origins and cultural backgrounds. This fact not only makes national unity a thorny problem, but also creates a situation where intolerance towards "different" ethnic groups is easily aroused. Since European nations with a homogeneous population—and here I am referring you to the countries which have already adopted, which the honourable justice referred you to and enumerated in his talk, and those are homogeneous nations, not nations with so many varied ethnic groups as we have in Canada—have found it advisable to adopt anti-hate legislation, it would seem that the need in Canada is all the more pressing, especially since there is evidence to suggest that some exponents of totalitarian philosophies now find fertile ground for their ideas in this country.

It is argued by those opposed to legislation intended to curb hate propaganda that the proponents of racial doctrine, do not always advocate violence and actual murder. Apart from the evidence that this is a doubtful assumption at best, the lessons of history show that any form of racism in society inevitably leads to a frame of mind in which racial intolerance develops into senseless hatred and often ends in murder. Our American continent, alas, abounds in too many examples of racial violence and murder. Hatred of the Negro in the United States often goes hand in hand with hatred of Catholics and Jews and others as well. Thus racial hatred is a dangerous divisive force in our society and is often exploited by a small group or groups with the intention to subvert democracy entirely and cause us all to lose all our basic freedoms and rights.

Again, past and recent history tell us that the principal force in thus corrupting the minds of men is the dissemination of hatred through propaganda.

This has been recognized in other countries and by world organizations such as UNESCO and the Council of Europe. France, for example, where freedom of speech and expression has been a basic tradition since the 1789 Revolution, has adopted legislation which outlaws the dissemination of hate propaganda.

In 1966 the Consulting Assembly of the Council of Europe, also known as the European Assembly, adopted a resolution condemning racial hatred and calling for appropriate measures to prevent its dissemination.

I have here a publication of UNESCO...

The Chairman: I think Mr. Justice Batshaw was going to give us the actual text.

Mr. Rubinstein: I have a copy here. It is headed: "European Assembly in favour of legislation against the propagation of racial hatred: (News transmitted from Strasbourg by ITA in February 1969)"

The Chairman: Very well; we will keep this.

Mr. Rubinstein: This resolution, unanimously adopted, calls on its members to recommend to the 18 countries belonging to the Council of Europe, to promulgate a law against the dissemination of racial or religious hatred, and against acts of violence which it may provoke.

The resolution was proposed by the British M.P., J. S. Richard, on behalf of the Judicial Committee of the Assembly. A model piece of legislation against the spread of racial hatred was attached to the resolution. According to this model law it would be a crime to publicly incite hatred and intolerance, or to advocate discrimination against individuals or groups on account of their colour, race, ethnic origin or creed.

There was some discussion on religion, but it was not included.

The Chairman: And it is your view that it should be included?

Mr. Rubinstein: Yes, it certainly should be. The proposed legislation also contains clauses according to which those spreading racial hatred should be judged. It also provides for the suppression of organizations devoted to this type of propaganda. Among others, it would be considered a crime to carry the flags, signs and uniforms—in other

words, it would be a crime to wear the swastika—and to publicly give the salute of those organizations.

That is what they did in the Council of Europe, but we are not exactly advocating that.

The Chairman. No.

Mr. Rubinstein: The resolution also calls on the 18 member countries to prepare an international treaty based on the recommended legislation.

In October, 1967 the Executive Council of UNESCO unanimously adopted a resolution condemning racial prejudice and urged legislation as an effective means of curbing the dissemination of hate propaganda.

I have here a publication of UNESCO of February, 1968 which contains the statement as well as the resolution. It is in both French and English, and it is my pleasure to produce it here. I would read just one paragraph from page 4:

National legislation is a means of effectively outlawing racist propaganda and acts based upon racial discrimination. Moreover, the policy expressed in such legislation must bind not only the courts and judges charged with its enforcement but also the agencies of government at whatever level or of whatever character.

This might perhaps answer the question that somebody raised, namely, what happens if the post office distributes undesirable literature. They suggest that even the Government be responsible for it. In other words, the Government must take proper measures to prevent it.

Senator Haig: Let us not add to Mr. Kierans' present troubles.

Mr. Rubinstein: On the last page I am just expressing an opinion which is shared by UNESCO which is, after all, a very important international body, but I am not saying that we must follow everything they do.

Noting that racial intolerance stifles the development of its victims, divides nations against themselves, aggravates international tensions and threatens the peace of the world, the resolution also pointed out that those who preach racial intolerance are themselves subject to its perverting influence. And, I read from this resolution:

The law is one of the principal means of ensuring equality of individuals and

one of the most efficient instruments in the fight against racial intolerance. The universal declaration of the Rights of Man, adopted December 10th, 1948, in addition to the international agreements which have come into effect since that time, can effectively contribute in the battle against all injustice stemming from racism, both on the national and international level. National legislation is an effective means of outlawing racial propaganda and actions based on racial discrimination...

It would, we suggest, be tragic if Canada, as a nation dedicated to world progress, showed reluctance to adopt measures deemed necessary by so many for the very survival of humanity.

We further believe that it would be a fitting contribution by Canada to the cause of human rights, both here and abroad, to pass the proposed legislation and eliminate the fear and animosities which hate literature arouses.

All of this is respectfully submitted, Mr. Chairman.

The Chairman: Now, witness, have you anything to add?

Mr. Rubinstein: I think you have spent a good afternoon listening patiently to witnesses, and I would not like to belabour you any more.

The Chairman: It is a splendid presentation you have made to us, and we are grateful to you for it. I see an old friend of mine over there, Mr. Shane...

Mr. Bernard Shane, Treasurer, Jewish Labour Committee: I was just going to ask whether you remember me, Mr. Chairman.

The Chairman: Yes, I do. Perhaps you have something to say?

Mr. Shane: Mr. Chairman, I am glad to shake hands with you. It has been a long time.

The Chairman: Yes, indeed.

Mr. Rubinstein: Mr. Shane is our senior member. He is the treasurer, and he provides the wherewithal of the organization.

Mr. Shane: Mr. Rubinstein has referred to this group, the Jewish Labour Committee, as not being altogether Jewish. The reason is

that the supporters of this group in the main are trade unions, some of which are led by Jews like myself but whose membership, however, is not Jewish. Some of our members are Jewish, but close to ten thousand of them are Greek or French, and we have also Ukrainians and others. The idea we are trying to propagate is that all humans are equal, and we are all entitled to the same rights. We cannot speak for the Jews and not for the Ukrainians and the Greeks.

Then too we are naturally a member of the labour movement—the Canadian Labour Congress. I am a member of the Canadian Labour Congress.

The Chairman: Are you not an officer of one of the needle trades union?

Mr. Shane: I am a vice-president of the International Ladies' Garment Workers' Union and a director for the Canadian territory.

So, from this standpoint we have spent a lot of hard work defending Negroes in the United States, as well as in Canada. We are active in every field of human rights.

At the beginning, when Hitlerism was at its height, we said that to defend the right of the Jews to live we must also defend the principle of equal rights for all. We now have the principle of human rights that the United Nations has given us.

The Chairman: How many members would there be in the Ladies' Garment Workers' Union?

Mr. Shane: The Ladies' Garment Workers' Union consists of about 450,000 members, of

which about 26,000 are in Canada. The Amalgamated Clothing Workers' Union has a similar number of members who belong to the Jewish Labor Committee. The Workmen's Circle is a fraternal organization, and it has a few thousand members in Canada. It varies with the different groups.

Thank you, Mr. Chairman. I just wanted to tell you who we are and I hope I have endeavoured to bring it across. We do believe that we need defence.

I am in Montreal. I was in Toronto in 1929, but I have been in Montreal since 1931. All these years I have been able to live with our fellow members as humans, not as Jews or as Frenchmen, Englishmen, Ukrainians—we have them all—but we did go through a hard period. I was the money man, the treasurer, and I was raising a family of four children on \$60 a week. So we did suffer as a result, and that is why we are so interested in defending human rights and getting this law passed. Thank you very much.

The Chairman: Thank you, Mr. Shane. I hope you keep in good health. Now, Mr. Reba is the secretary.

Senator Choquette: Well, he signed the brief.

The Chairman: And you have already heard the brief.

Mr. Rubinstein: I want to thank you again for your kindness in listening to us.

The committee adjourned.

APPENDIX "A"

MEMORANDUM from Mr. Justice Harry Batshaw submitting additional information to the Senate Committee on Legal and Constitutional Affairs RE testimony given by him on March 11, 1969.

1) In my testimony I referred to Canadian judicial opinion which is favourable to the adoption of this Legislation, and I mentioned specifically Chief Justice Gale of the Ontario Supreme Court, Appeal Division and Chief Justice Wells of the Trial Division of that Court. I find that a relevant excerpt of the views of Chief Justice Gale have already been reproduced on page 36 of the second proceedings on Bill S-21 of February 25, 1969 and therefore need not be repeated here. As for Chief Justice Wells, his views were referred to at length on page 33, the Second Proceedings on Bill S-5, February 29th, 1968. One of the paragraphs of his remarks as therein outlined reads as follows:

"...when, however, it (i.e. 'international defamation which is sometimes used to the disadvantage and hurt of the Jewish people') reaches the extremes which it has done in our own experience and lives, it would seem to demand something more and the power of the state must, I think, be invoked to protect any group which is subject to the vilification which has been expressed from time to time in various parts of the world..."

2) In my testimony I referred to the fact that the United Nations Association which I represent is not alone in recommending this Legislation but that it has been supported by unanimous resolutions of a number of other public bodies and organizations. An extensive list already appears on page 41 of the Second Proceedings of February 25th, 1969. The actual texts of these resolutions are not readily available to me, but I believe that they are of record in the Proceedings of the Committee which studied Bill S-5 last year and it should not be difficult to locate these texts in the archives of that Committee.

3) I undertook to give the Honourable Senators some additional information on Group Libel Laws in the United States. A number of States have Group Libel Laws and have had them for years. Amongst these are: Pennsylvania, Massachusetts, New Jersey and Illinois. An American judicial opinion, favourable to this type of Legislation, is instanced by the statement of Mr. Justice Jackson of the United States Supreme Court in the *Beauharnais* case above mentioned in which he said that "...sinister abuses of our freedom of expression...can tear apart a society, brutalise its dominant elements and persecute, even to extermination its minorities."



First Session—Twenty-eighth Parliament

1968-69

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 5

Fifth Proceedings on Bill S-21,

intituled:

"An Act to amend the Criminal Code".

TUESDAY, MARCH 18th, 1969

WITNESSES:

1. The Canadian Labour Congress: Mr. Gérard Rancourt, Executive Vice-President; Mr. A. Andras, Director; and Mr. Art. Gibbons, President, Human Rights Committee.
2. Dr. Mark R. MacGuigan, M.P.

The Queen's Printer, Ottawa, 1969

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Giguère	*Martin
Aseltine	Gouin	McElman
Belisle	Grosart	Méthot
Choquette	Haig	Phillips (<i>Rigaud</i>)
Connolly (<i>Ottawa West</i>)	Hayden	Prowse
Cook	Hollett	Roebuck
Croll	Lamontagne	Thompson
Eudes	Lang	Urquhart
Everett	Langlois	Walker
Fergusson	MacDonald (<i>Cape</i>	White
*Flynn	<i>Breton</i>)	Willis

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code."

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—

Resolved in the affirmative.

Extract from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reim-

bursement as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.

Extracts from the Minutes of the Proceedings of the Senate, Tuesday, March 11th, 1969:

With leave of the Senate,

The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, March 18, 1969.

Pursuant to adjournment and notice, the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Belisle, Choquette, Croll, Fergusson, Flynn, Gouin, Haig, Hollett, Lamontagne, Lang, Langlois, Macdonald (*Cape Breton*), Martin, McElman, Prowse, Thompson, Urquhart, Walker and Willis.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel;

The following witnesses were heard:

1. The Canadian Labour Congress: Mr. Gérard Rancourt, executive vice-president, Mr. A. Andras, Director, and Mr. Art Gibbons, president, Human Rights Committee.
2. Dr. Mark R. MacGuigan, M.P.

At 4:50 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

L. J. M. BOUDREAULT,
Clerk of the Committee.

THE SENATE

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Tuesday, March 18, 1969.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the chair.

The Chairman: Members of the committee, it is time to commence. We have a very fine program for you this afternoon. We have here two bodies; one is made up of representatives of the Canadian Labor Congress. It is not necessary for me to describe this body further; it will be described to you by the speakers who are here. I would mention however, that this delegation is representative of 1,600,000 people which fact should make us understand the necessity for listening very carefully to what they have to say.

We also have present Dean MacGuigan whom I will introduce later. It is not a matter of precedence who goes first, but rather a case of what is practical, and I understand that some of the members of the delegation from the Canadian Labor Congress have to catch trains or planes or something of that kind, and on those grounds I am going to call upon them first. I hope the professor will not mind my doing so.

You have all had a memorandum from the Canadian Labor Congress which I hope you have all read, and I now call upon Mr. Rancourt to address us.

[*Translation*]

Mr. Gérard Rancourt, Executive Vice-President, Canadian Labour Congress: Mr. Chairman, first of all, I should like to introduce the persons who have accompanied me here.

There is Mr. Andras, to my right, who is the Director of our Legislation office or

branch; Mr. Frank Shea, who is Secretary of the Congress Committee on Human Rights.

We do not have a very large delegation. This is because only the members of our Committee on Human Rights were invited to appear before you. I shall read our submission because it is very short; if I attempt to summarize it, I feel I shall take just as much time as if I read it to you.

The Canadian Labour Congress, on whose behalf this brief is submitted, is a major trade union centre representing some 1,600,000 trade union members throughout Canada. These members and their families are a cross section of the Canadian people and reflect the diverse elements which make it up. They consist not only of native Canadians but many others who are of relatively recent origin and who still have a strong sense of ethnic, cultural, religious or linguistic identification with peoples in other parts of the world.

The Canadian Labour Congress states in its constitution that one of its purposes is "To require all affiliates to extend union membership and organization in Canada to workers, regardless of race, colour, creed, sex, age, or national origin." This Congress has since its inception maintained a Standing Committee on Human Rights. It has supported the Universal Declaration of Human Rights and it has engaged in a variety of activities to prevent discrimination based on such irrational and subjective grounds as race, religion or national origin. The appearance of the Congress in connection with Bill S-21 is, therefore, an extension of its interest in the field of human rights in general and more specifically in support of such measures as will protect minority groups against vicious and dangerous acts such as those contemplated in the Bill.

[*English*]

Senator Choquette: Mr. Chairman, might I intervene at this moment? I understand every word this man says, but there are many others who do not. We have no simultaneous translation. If this man is going to read as

rapidly as he is reading now, why does he not just file it? I think there are four or five senators only in the whole committee who can follow him. Who is this man, and what does he represent? I might have been late; I do not know.

The Chairman: I made some suggestions with regard to Mr. Rancourt. He is a representative of the Canadian Labour Congress, a very important institution in Canada. He is a representative of about 1,600,000 labour people. Just what office do you hold in the Labour Congress, Mr. Rancourt?

[Translation]

Mr. Rancourt: I am the Executive Vice-President of the Congress. The Committee has invited us here to present this brief. We are not intruders and do not wish to impose.

Senator Choquette: Do you have a translation of your brief?

Mr. Rancourt: Yes, we have the brief in English and in French, but I felt I would read it a little faster because you already have a copy and can follow me quite easily.

Senator Choquette: Go ahead and read it in French.

Mr. Rancourt: You do not have a copy?

Bill S-21 is not long. Am I really reading too fast?

[English]

Do I read too fast, or do you all have copies of the brief? If you do not, I will read slowly.

Senator Croll: I do not understand one thing, Mr. Chairman, and that is this. Room 356 upstairs has a simultaneous translation system. Is it being used? If we held the meeting there, we could all be able to follow him.

The Chairman: I do not know that, but I could find out very quickly.

Senator Walker: You have the translation in English right here.

Senator Croll: I can read it all right, but why should we go through the exercise?

The Chairman: I am informed that, while the room may or may not be vacant, we have no interpreter available to handle it.

Senator Croll: All right.

Senator Lang: Senator Lamontagne might handle it for us!

The Chairman: I did not know the address would be in French. A witness is always entitled to address us in French, if he desires to do so. It is unfortunate we are not all bilingual, so I do not know what we should do. Senator Choquette, only how many did you say could follow the witness?

Senator Choquette: I think, five or six.

Senator Croll: Let him go ahead, and we can read it in English.

The Chairman: All right. Go ahead, Mr. Rancourt.

[Translation]

Mr. Rancourt: Mr. Chairman, I thought that, before a committee of the Canadian Senate, I would have less difficulty than this in having myself understood in French.

Senator Choquette: Continue in French.

Mr. Rancourt: I greatly deplore these interruptions.

Senator Langlois: There is no difficulty.

Mr. Rancourt: Bill S-21 is not long and consists of only three proposed amendments to the Criminal Code. The Bill seeks to provide sanctions against those actions which may lead to the destruction or to the injury of an identifiable group as defined. It is intended, therefore, to act as a deterrent against expressions of views in which there is the clear danger of destructive consequences. The Bill does not, in our opinion, erect barriers against freedom of expression beyond what may be expected of reasonable men in the pursuit of peaceful ends. On the contrary, we see the Bill as clearly permitting the right to express opinions which may be ill-reasoned, malicious and harmful to the peace of the community. If the Bill suffers from any defect of extremism, it is not that it curtails freedom of speech as much as it indicates to hate propagandists how far and wide they may spread their activities without being haled into court for the commission of a crime.

We consider that the Bill is a timely one and regret that circumstances over which the Senate of Canada had no control delayed its consideration sooner. There is an abundance of evidence on every side demonstrating that ethnic, religious and other such differences may lead to the most appalling of consequences, including genocide. It is hardly necessary here to elaborate on the history of

the last few decades to demonstrate this fact. Current events make them abundantly clear. The Bill is furthermore consistent with the general trend visible throughout Canada of entrenching human rights through legislative enactment. This process is consistent with declarations and other instruments adopted by international bodies such as the United Nations and the International Labour Organization.

[English]

Senator Hollett: Before you go on to paragraph 5, in the middle of paragraph 4 you say:

Current events make them abundantly clear.

What are the "current events" that "make them abundantly clear"? You say:

It is hardly necessary here to elaborate on the history of the last few decades to demonstrate this fact. Current events make them abundantly clear.

What current events?

Mr. Rancourt: We refer later on in this paragraph to the enactment of all kinds of human rights legislation right across Canada. So, this is the trend today, where you have more and more human rights legislation.

Senator Hollett: I was wondering if it was something that was happening here in Canada.

Mr. Andrew Andras, Director of Legislation and Government employees, Canadian Labour Congress: The purpose is not to direct attention to any event in Canada, but to the world in general.

Senator Walker: There are no events in Canada, are there?

Mr. Andras: We did not suggest there were, senator.

Senator Walker: And you are contemplating the future?

Mr. Andras: The context of this paragraph should be read in its historical perspective. We are thinking of the extermination conducted by Nazi Germany, if you wish, and in more recent times the charge of genocide being levelled by the Ibo tribe in Nigeria.

Senator Hollett: That is what I thought, and that is why I do not understand the "cur-

rent events" part. It means presently, does it not?

Mr. Andras: At the present time, while we are sitting here, presumably.

Senator Walker: You are really talking about modern history, are you not?

Mr. Andras: Yes, that is right.

Senator Walker: But that is not "current".

Mr. Andras: In our own lifetime, that is current.

The Chairman: I would suggest that anyone who wishes to ask questions out of the English text should please keep them until we have finished the reading in French, and then we will turn to the English text.

Senator Hollett: All right.

The Chairman: Go ahead, Mr. Rancourt.

[Translation]

Mr. Rancourt: We consider that the proposed Section 267A is a self-evident proposition. It sets out to make the advocacy of genocide a criminal offence. We do not think it is incumbent upon us to engage in any extensive argument in support of this proposal. The criminality of genocide speaks for itself. We are pleased to note that the definition of genocide includes not only the physical destruction or the elimination in whole or in part of any group of persons but acts which might cause "serious bodily or mental harm" to members of the group. We are pleased also to see that it goes even further in the definition by prohibiting the destruction of a group through the forcible assimilation of its children into another group. The key words in this section are "with intent to destroy" and we think these words are important not only because they are protective of the right of freedom of expression but because they establish the criterion by which it may be possible to measure or to challenge acts of individuals and of governments. Honourable Senators are well aware that Canada has ratified the United Nations Convention on Genocide and is one of more than 60 states which have done so.

6. Turning to the proposed Section 267B, we wish in the first instance to register our objection to the fact that the definition of "identifiable group" in sub-section (5) (b) does not include the word "religion". This is, we submit, a very serious omission and inconsis-

tent with other legislation which is to be found in Canada for the protection of human rights. The Canadian Bill of Rights for 1960, Part I, makes specific reference to "religion", in the general statement in Section 1 and again in subsection (c). In the proposed Canadian Charter of Human Rights the statement is made that "...constitutional action is required in order to protect all Canadians from legislative interference with their religious beliefs." The Canada Fair Employment Practices Act makes specific reference to "religion" when it lists as a prohibited employment practice the refusal "to employ or to continue to employ, or otherwise discriminate against any person in regard of employment or any term or condition of employment because of his... religion." The federal Fair Wages Policy contains a very similar provision in its context. Provincial legislation follows a similar line. We consider it important that the word "religion" should be included in the definition because there are in Canada groups which are distinguishable in their own minds and in the minds of the community at large by their religion rather than by ethnic or other characteristics. We have in mind such groups as Dukhobors, Hutterites, Jews, Jehova Witnesses and others. There is a record in Canada of animosity groups expressed at times through anti-social behaviour and legislative restrictions.

7. Apart from this weakness in Section 267B, we support the Section as a whole because of what it sets out to do. It is consistent with the Report of the Special Committee on Hate Propaganda in Canada. The purpose of this section is quite clear. It is to make a felony of the communication of statements against an identifiable group which may lead to a breach of the peace or the promotion of hatred or contempt against an identifiable group. The section provides various remedies against such actions. We are in favour of this section because of its possible deterrent effects. We are not so optimistic as to believe that this Section when enacted will cause those whose minds are warped by prejudice to change their ways of thinking or their private behaviour. We do not think that legislation is capable of accomplishing this goal, at least not quickly. The purpose of legislation is to control behaviour, not thought, and it is behaviour we are concerned with. To the extent that Section 267B will preclude the dissemination of oral or written propaganda which might otherwise do injury to an identifiable group, this section will have served

its purpose. In time, it may imperceptibly lead to a different norm of behaviour because Canadians generally are a law-abiding people.

8. We believe that there are sufficient provisions in Section 267B to prevent its abuse by undue restrictions on the right of free speech and free press. We refer specifically to subsection (3) and to the procedures in the proposed Section 267C. On the issue of free speech as it is affected by Bill S-21, we believe it is relevant to call your attention to the comments made by Dr. Mark R. MacQuigan, then Dean of Law at the University of Windsor, in *Chitty's Law Journal*, November, 1967. Writing on what was the Bill S-5 and the Cohen Report, Dr. MacQuigan said:

9. "The larger question, however, has to do with the danger of such restrictive legislation to free speech. It is well to concede at once that Bill S-5 does limit free speech. But unless one goes to the extreme of maintaining that there should be no limitations at all on speech (and consequently that existing laws on libel and slander should be abolished) the real issue can only be phrased in terms of whether the Bill *unduly* limits the freedom of speech.

10. "The proposed offence of group defamation is deliberately defined in such a way as to minimize the danger to free speech. First, the prosecution would have to show that any promoting of hatred or contempt of an identifiable group was wilful, that is, that the accused had an actual intention to promote hatred, and was not merely negligent in utterance. Moreover, the Bill proposes two exculpatory provisions. One of these is identical with the defence allowed to a charge of criminal defamation (against an individual): thus there would be no liability where the accused proves that his statements "were relevant to any subject of public interest, the public discussion of which was for the public benefit, and that on reasonable grounds he believed them to be true." The other defence, that of unqualified truth, is unprecedented in the area of criminal defamation, but was strongly recommended by the Cohen Committee on the ground that more latitude is necessary in matters of general discussion than in talk about individuals.

11. "These exculpatory clauses have been attacked from both sides. On the one hand, it has been claimed that they are built-in escape hatches and that anyone who professes belief

in the truth of the propaganda would be acquitted on a charge of communicating it. On the other hand, it is argued either that the exonerating provisions still do not leave enough breathing space for free expression, or that they are insufficiently precise and that in the process of drawing a more precise line the Courts will inevitably, at least from time to time, transgress on civil liberty. It is this last argument which is the weightiest objection to the Bill.

12. "Perhaps there is no legally certain formula which could reassure every critic in advance. Where there is a question of balancing interests, since the weight to be assigned to various interests is largely a matter of individual value judgment, the fulcrum will be located differently by different persons. Moreover, there is undeniably some degree of ambiguity about the words of Bill S-5 which only judicial decision can resolve. In my own view not only must the balance be struck so as to give some protection to minorities against defamation but the balance actually struck by the drafters of the Bill manages to do that and at the same time preserve free speech without substantial diminution."

13. There is no need to extend the argument in favour of this Bill. It has received support in the Senate itself and among various Canadian institutions. It is, in our opinion, a necessary measure in a country like Canada which has been likened to a mosaic because of the many and widely diversified groups which make it up. But the essence of a mosaic lies in its intrinsic harmony, otherwise it is nothing more than a medley of unrelated pieces. We do not want to labour the metaphor. Our interest is in seeing the imposition of some reasonable restraints on those who, unrestrained, might do serious damage to national unity and inflict harm on groups which have a legitimate place in the community. There is a long and dismal record of racial and religious animosities which have led to persecution and slaughter. Fortunately, Canada has escaped the more outrageous of these manifestations of prejudice. But to say this is not to justify the absence of protective measures. We believe that the proposed new Sections in the Criminal Code are justified and should commend the support of the Senate and of Parliament generally.

Canadian Labour Congress.

[English]

The Chairman: Thank you, witness. Do you, or does one of your number, wish to read this in English?

Mr. Rancourt: No, we do not want to read it in English.

The Chairman: Are there any questions that members of the committee wish to put to the witness in the French language? If not, shall we proceed to discuss in English the very important statements that have been made in this brief. If there are no questions, may I say that I have read the brief in English and found it a very fine document indeed. I can speak on behalf of all the members here in thanking you, the representatives here, and your organization for giving us this information and assistance. Your brief will be thoroughly considered by the committee and action taken accordingly. If that is all you have to offer—

Senator Hollett: Can we not ask any question in English?

The Chairman: Yes.

Senator Fergusson: I would like to hear from Mr. Andras. I am sure he must have something he can say to us who can speak only English.

The Chairman: I quite agree. I also would like to hear from Mr. Andras.

Mr. Andras: Thank you, Mr. Chairman. You already have in English what Mr. Rancourt read in French. At all events, we made copies available to honourable senators.

In effect, our brief says two things. It endorses the bill in principle and asks for one important correction, which is that the definition of "identifiable group" should include the word "religion" as well as the other terms already included. In that respect we would draw your attention to the fact that the Report of the Special Committee on Hate Propaganda in Canada, commonly called the Cohen Report, makes specific reference to religion, but for reasons which are not known to us the word was omitted by those who drafted the law. The recommendation of the committee itself, which is contained on page 70 of the report, includes the word.

Senator Croll: Do you know the reason why it was left out?

Mr. Andras: No, sir. You might know, senator.

Senator Croll: I merely indicate to you that we were told by the Justice Department that you cannot very well change your colour or

your ethnic origin but you can change your religion. That was their thinking.

Mr. Andras: That seems to me an argument of a very inferior order of logic, if I may say so with much respect to those who gave you that opinion. There is an abundance of legislation in existence in Canada at the present time that includes the word "*religion*", and we so indicate in our own brief. The Cohen Committee, on page 51 of its report, quotes from the radio regulations that govern broadcasting in Canada, in which there is specific reference to religion. It says:

No station or network operator shall broadcast (a) anything contrary to law; (b) any abusive comment or abusive pictorial representation on any race, religion or creed.

I do not know why religion and creed are both there; they would seem to be synonymous. However, that is not my business. We have the Fair Employment Practices Act, the Bill of Human Rights and a good deal of other legislation, as well as the fair wages policy of the Government of Canada which includes a fair employment provision. If my memory serves me right, nine of our ten provinces have human rights legislation which is consistent in this respect in that it recognizes religion as an identifiable characteristic that should be protected against discrimination.

We are therefore not persuaded that the word "*religion*" should have been omitted. On the contrary, we are more firmly convinced than ever that it should be included, and we would be very pleased indeed, and consider it an act of public service, if you were to recommend to the Senate as a whole that the word "*religion*" should be put into the section dealing with the definition of "*identifiable group*".

The Chairman: Let me go just a little further. The report also includes national origin. Would you be in favour of adding national origin as well as religion?

Mr. Andras: By and large we would favour a definition comprehensive enough to protect a group that is readily identifiable by some such title against discrimination. In the fair employment practice legislation the term "*nationality*", for example, or "*national origin*" is to be found, and it is a misdemeanor for an employer to have an application form that seeks to determine national origin or nationality. We would not object to the inclusion of

national origin. As a matter of fact, the recommendation of the committee itself would be quite satisfactory because it is more comprehensive than the one to be found in Bill S-21.

The Chairman: I may say that the question of adding "*religion*" has been discussed in this committee on previous occasions. While, of course, I cannot answer for what the committee will do when we come to revise the bill, I can tell you that it will be thoroughly discussed and considered. We thank you for your recommendation.

Mr. Rancourt: Catholics and Jews as religious groups are identifiable groups. Criticizing a group that practises a religion is quite a different thing from criticizing the religion. We do not want to prevent anybody saying he is against religion, that he is an atheist or whatever it might be, but when he singles out a group of people practising a religion and condemns them as one group, that is a very identifiable group and it should be so mentioned in the law. There has been persecution of groups of people who share the same views on religion, such as the Jehovah's Witnesses and other groups. There has been that kind of persecution.

The Chairman: There is a question before us at the moment upon which perhaps you can give some assistance. The bill is really in two parts, one dealing with the advocacy of genocide and the other the dissemination of hate literature. You will notice that in the genocide provisions the reference is to the advocacy of the genocide of any class—not identifiable but any class of people—while the hate literature applies only to attacks upon identifiable groups. Do you think it would improve the bill if we amended it to restrict the advocacy of genocide to identifiable groups? Have you given that any consideration?

Mr. Andras: You have the advantage of being very learned in the law, and all of us happen to be laymen.

The Chairman: Learned, yes, but very learned, I do not know.

Senator Choquette: What about advocating that a whole nation be exterminated or sterilized? Did you ever hear of that?

Mr. Rancourt: That would be genocide.

Senator Choquette: Did you ever read Mr. Kaufmann's book, which he published in

1941, entitled *Germany must Perish?* There he explained his whole plan and how he could sterilize all the Germans. Twenty thousand surgeons would be recruited among participating nations who would do 25 operations daily and in the course of a few months or less than three years, all German males would be sterilized. Did you hear about that?

Mr. Andras: No, sir, but we would not support such a proposal.

Senator Choquette: That was in 1941. That was genocide of a whole nation and a whole people.

Mr. Andras: Well, senator, looking at the word genocide and trying to go behind it to its etymology the word seems to suggest, if I understand correctly, the death of a people. Now, if you consider the people of Germany to be a people, what was suggested by Mr. Kaufmann was genocide. Section 267A does not confine itself to a people in that sense except that the word genocide implies—what it does refer to is groups. I would read into it, as a layman, a group that has some degree of homogeneity which makes it recognizable.

Senator Choquette: That was quite a group though. It was a large order too was it not?

Mr. Andras: Yes, but surely you do not expect me to defend what you have just read as being advocated. I find it rather horrifying to have heard it from you, senator, and our purpose here is not to support but to combat such a proposal or even lesser proposals such as are contemplated in subsections (c), (d) and (e) of section 267. For example, we are just as much concerned about them as about subsection (e) of section 2, forcibly transferring children of a group to another group. This does not involve physical destruction whatever, but it does involve the ultimate destruction of a group which is identifiable as such.

For example, if we were to take the offspring of our indigenous peoples in Canada, the native Indians and Eskimos and forcibly distribute them, as I understand it, this would be genocide within the meaning of section 267A.

Senator Hollett: Are you suggesting that the Canadian nation would ever think of doing a thing like that? I do not like this bill because it makes people outside of Canada think that we have problems of that nature. We have not got such problems. What the devil is the good of the act therefore?

Mr. Andras: With much respect, senator, a government passes legislation to prevent the commission of crimes. We know from history of the last generation that crimes have been committed at certain times. This has led to the United Nations Convention on Genocide which has been endorsed by Canada, as one of about 60 or 65 countries. It is entirely proper and suitable that Canada should implement the endorsement of a convention by an enactment of legislation. We cannot see the future. It is not within our powers to do so, but we can anticipate possibilities, and this is one of the purposes of law, as I understand it. We have not only endorsed the United Nations Convention on Genocide, but I think quite properly the Senate has introduced the bill to control it within the means of the Criminal Code.

Senator Lang: Mr. Andras, concerning the labour movement, I would like to put a theoretical case to you. In the heat of a meeting following a strike, or in the heat of a strike action somebody got up in the meeting and said, "I advocate the destruction of employers who hire scab labourers." Do you think that is advocating genocide?

Mr. Andras: No, sir. I think it is a rather stupid thing to say in any event. I think there are other sections in the Criminal Code that would quite well take care of such a case.

Senator Lang: May I suggest that falls within the meaning of section 267a? It is advocating the destruction of a group of persons.

Senator Lamontagne: If it can be identified.

Senator Lang: In other words, no word of identification.

Mr. Rancourt: Sometimes it is very difficult to identify an employer.

Senator Lang: There are a group of people.

Mr. Rancourt: I want to say something—

Senator Lang: May I say something further? If I advocate the destruction of the Mafia and by public statement under this section I am guilty of genocide either of a destruction of a group of persons or—

Mr. Rancourt: They should not be destroyed as persons either, be they criminal or good people. It does not matter; they are a person and a citizen and a human being.

Senator Lang: Would you listen to me, please? I am not talking about the merits of my proposition. I am talking to you about the legal construction of section 267A as it now stands.

Mr. Rancourt: Like we said in the brief, there are many terms in the court and court will have to define them and what exactly their meanings are. They will be recentered and created. I want to come back to what the other senator said. You presume there is no distribution of hate literature in Canada at the present time and no need for such legislation, because we are all good people in Canada and nobody is going around distributing hate literature or advocating the destruction of one race or another. I suggest that it is the contrary, that it does exist in Canada. I do not know, up to the present day, but up to a few months ago in Quebec you and a group distributing that kind of literature, a Nazi group, talking to hard-core organizations and going by the name of Larivière, who has been advocating distributing that kind of literature in newspapers. He has been saying that we should take all the Jews, for example, and send them back to Israel or kill them and do the same with the Negro. This is serious and it is the kind of thing we should stop. It is a disease. We take measures against disease and we should take measures against that kind.

Senator Hollett: Surely the Criminal Code can take care of most of that, can it not?

Mr. Rancourt: Apparently not, and it does not. The Criminal Code, to my understanding, would be such that if you tell a guy that an individual is bad and is a criminal and a thief you are subjected to libel. But if you tell a whole group of people that they are criminals and that they are bad you are not prosecuted. This is what this law will correct, the discrimination against groups. To me it is more serious to discriminate against a group than one individual, because that creates disunity.

Senator Choquette: I will ask you point blank. Your name is Gerard Rancourt.

[Translation]

Mr. Rancourt: Yes, sir.

[English]

Senator Choquette: Are you a French Jew?

Mr. Rancourt: No, I am not a Jew. I am a French Canadian.

Senator Choquette: Oh, I thought you were. You are certainly taking quite an attitude.

Senator Croll: Do you think it would make any difference if he was?

Senator Choquette: It would be, because he would be prejudiced.

Senator Croll: Prejudiced? What do you mean he would be prejudiced?

Senator Choquette: Prejudiced in favour of passing the bill.

Senator Croll: I hope so.

[Translation]

Mr. Rancourt: If I were a Jew, I would be proud of it, just as I am proud to be a French Canadian.

[English]

The Chairman: In all events, you brought out that the witness is disinterested personally in the matter of Jewish claims and so on. May I ask this question because it may get us down to business. If we added national and religion to the identifiable groups, would that not be sufficient and then if we used that definition with the additions mentioned with regard to genocide rather than leaving it in the open to all groups, what would you say to our wisdom or otherwise?

Mr. Andras: It is a double barreled question.

The Chairman: Yes, it is two questions. First, shall we add the national and religion to the definition and if we do that would you advocate that we limit the advocacy of genocide to the advocacy of the killing, of getting rid of identifiable group instead of to any group?

Mr. Andras: One of the senators raised a question before where he used employers as a group which sort of seemed to hoist us up on our own petard. This is not good for us; it destroys our morale.

Senator Walker: That will be a cold, frosty morning.

Senator Lamontagne: Labourers are employers too.

Mr. Andras: Yes. While you were engaged in that exchange, I was looking at page 56, which quotes an excerpt from the convention prepared by the General Assembly of the United Nations in 1948, and it says, in its most relevant article, as follows:

In the present convention, "genocide" means any of the following acts commit-

ted with attempt to destroy, in whole or in part, a national, ethnic, racial or religious group as such.

It would seem to me, therefore, although I might want to go back and suggest to my officers that they consult legal counsel, that if we were to follow this lead of the United Nations, we would be fairly safe in our approach to genocide in the Criminal Code.

Senator Lang: Mr. Andras, I might draw your attention to the wording in that section. It says that "genocide" includes any of the following—it does not say it means.

The Chairman: It does not exclude the ordinary meaning of the word "genocide".

Senator Lang: No, but it adds things on to it.

The Chairman: It may not add anything to it, if it makes it clear that these things are included.

Senator Lang: So, it is broader than the convention.

Mr. Andras: I am sorry. I missed your point. This bill would seem to be broader, yes. Actually, senator, we would want to maximize the protection. Purely in lay terms—and I hope you do not try to catch me out on that, because I cannot argue law with you—purely on lay terms, looking at it purely as a layman, born and bred in this country, when we talk about groups and genocide we all know perfectly well we are not concerned with the possible advocacy of the destruction of the employers. This is fantasy. When we talk of genocide in Canada, in the light of the experience over the last 25 or 35 years, we know perfectly well, as citizens of this country, as business people who read the press and who read history, what is meant by this term and to whom it has been directed. Therefore, when we use the word "group" or when the Senate uses the word "group" here, we who sit here as members of organized labour, we know whom we are talking about, and it is not the employers.

Senator Croll: When you take a look at the report, you will see that clause (d) in 267A and clause (e) were added and are not part of the Cohen Report, for the purpose of clarification.

Mr. Andras: I do not see that.

Senator Croll: Take a look at it.

Mr. Rancourt: In the definition of genocide?

Senator Croll: Yes.

Mr. Rancourt: But it seems that all these, (a), (b), (c) and (d)—

Mr. Andras: You are right.

Mr. Rancourt: Most of them would be a criminal act, anyway.

Senator Croll: We are dealing with this particular one. The purpose of the section, as I understood the law officers to say, is to define more clearly what was intended, and rather it was not included to broaden it at all. It was intended to define, and these terms are commonly accepted as indicated in (d) and (e). The others are contained in the report.

Mr. Andras: That is right.

Senator Lang: May I draw the witness's attention to this, that this section does not indicate the definition of genocide or expand the definition of genocide. It is to make the advocating of it an offence. That is quite a different proposition.

Senator Croll: Advocating or promoting.

Mr. Andras: Subsection (1) refers to advocacy or promotion. Subsection (2) includes any of the following acts—so that this thing operates on two lines.

Senator Lang: No, it is the same line. It defines what genocide means. It is still the advocating or promoting, under subsection (1) that is an offence.

Senator Lamontagne: Genocide itself is certainly criminal, as far as I know.

Mr. Rancourt: We are making it an offence, that anyone who advocates any of these, (a), (b), (c), (d) or (e), commits a crime against a group and he should be punished and something should be done about it.

The Chairman: He should be restrained.

Senator Lang: What if I advocated sterilization of all mental incompetents—would that be advocating genocide?

Senator Lamontagne: I think it would, if you were advocating the sterilization of everybody in that group.

Mr. Andras: I would think that the answer to that would be that people who have conscientious scruples against sterilization might

tend to regard that group as being an identifiable one.

Senator Lang: If I advocate such a thing, should I thereby be committing a criminal offence?

Mr. Andras: I would hesitate to say so.

Mr. Rancourt: If it is a group that is referred to.

Senator Lang: Well, the mental incompetents would be the group.

Mr. Andras: It would require a very careful definition of mental incompetence.

Senator Lang: I would suggest that that falls within the ambit of the section.

Mr. Andras: I would not think that was intended, and I doubt whether it would be pursued in that fashion.

Senator Lang: I doubt if it was the intention, but the road to hell is paved with the best intentions.

Mr. Rancourt: In the Explanatory Note to the law, it gives that indication.

Senator Lang: Judges do not...

Mr. Rancourt: No, they do not care about these things.

Senator Prowse: I wonder if I might seek clarification here. In section 267A at present it refers to a group and then any of these acts with respect to a group constitute genocide. We are not dealing with the act itself but with the promotion of it. In other words, you cannot say that these things should happen about any group. Now, this gets pretty broad and it has no precise legal meaning.

In another section of the act, 267B, for example, there is a definition in subsection (5), paragraph (b), which says that "identifiable group" means any section of the public distinguished by colour, race or ethnic origin.

Senator Roebuck has suggested, as indeed others have, and other witnesses have, that it would improve this act—and you yourself said it—if we added "religion" in there. Then, it has been suggested that we add also "national origin". When you go back to genocide, then, this section 267B that I have read, does not apply.

It has been suggested that it would improve this legislation by making it clear what we intended and not allowing frivolous questions

to be raised, as to when you want to kill a whole hockey club or something which would be a group as such. We should then in section 267A have an identifiable group and then have the definition apply to both.

In your opinion, would it or would it not improve the legislation, from your point of view, if we added these qualifying words to section 267A?

Mr. Andras: The chairman asked a question along those lines and I think our reply was that if section 267A were to contain terminology similar to that in the United Nations convention we would not object, although we reserve the right to make subsequent representation if legal advice indicated to us that this was not a wise reply.

The Chairman: Will you do that, will you consult and write us then?

Senator Croll: I have a note here—although I cannot follow this from day to day—in dealing with subsection (5)(b). You spoke about religion and national origin. I have a note here on language. Do you remember our discussing language as another aspect?

The Chairman: Not very seriously.

Senator Choquette: That would shut everyone up completely.

Senator Croll: That was the Justice Department which was discussing this with us.

Senator Lang: It is in the Cohen Report.

The Chairman: Honourable senators, we must draw this consideration to a close because we have another witness to hear from, but before doing so I would like to call your attention to the fact that on page 69 of the Cohen Report, under Chapter VI, Recommendations, at the very bottom of the page there appears the following:

5) In this section

(a) 'Genocide' means any of the following acts committed with intent to destroy in whole or in part, any identifiable group:

The report has answered our questions to the extent that a report can do so. It is suggested that identifiable group apply to genocide as it does to the balance of the bill.

Now, honourable senators, I am sure I am speaking on everyone's behalf when I extend to the witnesses our thanks for their coming and giving us the benefit of their knowledge

and wisdom and for the attention they have given to this matter. And may I include in my thanks not only Mr. Rancourt and Mr. Andras but also those who have not been heard but who are here giving us the benefit of their support. I am referring to Mr. Sam Hughes, Mr. Alan Schrader, Mr. Paul Lind and Mr. Frank Schaefer. You will notice, honourable senators, that the document that they have put in our hands is signed by Donald MacDonald, the President, William Dodge, the Secretary-Treasurer and Joseph Morris, the Executive Vice-President and Gérard Rancourt, who is sitting beside me, the Executive Vice-President of the Congress.

I think I can extend the thanks of us all to all these gentlemen who have taken part in this consideration and particularly to those who are here giving us the benefit of their knowledge and wisdom.

Mr. Rancourt: Thank you, Mr. Chairman. We are glad to be here.

The Chairman: Thank you, gentlemen.

Honourable senators, our next witness is Mr. Mark MacGuigan, M.P. He is still professor of law at the University of Windsor. Prior to being elected to the House of Commons he was the Dean of the Law School of the University of Windsor. He has been professor of law at Osgoode Hall in Toronto, of the Law Society of Upper Canada. He was formerly Chairman of the Canadian Civil Liberties Association and he was a founding director of that important organization.

He is now, as I say, a member of Parliament—a very prominent one—and before all in this connection he was one of those who studied and produced the so-called Cohen Report. He is one of those who signed that report, which is now before us, and which was instrumental in bringing this study before the committee. So, honourable senators, I have pleasure in introducing to you Mr. Mark MacGuigan, M.P.

Mr. Mark R. MacGuigan, Member of Parliament: Honourable Chairman and honourable senators, I am sensible of the honour you do me in extending to me the invitation to appear before you, and I am grateful for the courtesy. While I do not have a written text, I do have a number of ideas that I would like to present to you in some logical sequence. Then I am sure that you will want to have discussion on some of the particular points that I have gone over.

Senator Lang: I wonder if I might interrupt at the beginning, Mr. Chairman? I think we have in Mr. MacGuigan a man with a background of knowledge in connection with this legislation unlike other witnesses. We have had heretofore. I for one would be very interested in knowing the history of this legislation—not when it came into the Senate about four years ago, but prior thereto—and the background leading to the setting up of the Cohen Commission upon which Mr. MacGuigan served. Its origin, I think, is probably in the United Kingdom; I believe it came over here via an M.P. I happened to meet in another M.P.'s office with Pauline Jewett when she was in the house.

Background details of this sort would be interesting to the committee. We all know the legislation did not simply come out of the thin air.

Mr. MacGuigan: I am not sure, Senator Lang, that I can give you all the surrounding gossip, but in my comments I hope I can be frank enough to give you some indication of what went into the committee's deliberations and some of the background surrounding the report. I must say that I have not specifically come prepared to talk on all of the background details in terms of the particular incidents of distribution of hate propaganda in Canada. They are all contained in the report and I could recall some of them from memory and read the others to you, if you would like.

Perhaps, if I make the presentation that I have in mind, there will be other avenues that you would like to explore after I have made these few preliminary comments.

The Chairman: Very good.

Mr. MacGuigan: Now, the Special Committee on Hate Propaganda reported in 1966, and I am going to refer to that committee from now on as the Cohen Committee. As you know, it recommended amendments to the Criminal Code to make criminal the advocacy of genocide, the public incitement of hatred and the wilful promotion of hatred, the three basic notions or illegalities which are envisaged by this document before us, in addition to the one which was added by the Government over and above the recommendation of the Cohen Report which relates to the seizure of materials which are hate materials. Now, with the exception of that amendment respecting seizure, I think I should say frankly in the beginning—and perhaps, since I was a member of the committee,

you will pardon me for being so immodest—I think I should say in the beginning that I disagree with all the changes that were made by the Government in the recommendations of the Cohen Report. In most cases I disagree with them very strongly, and in the course of my remarks I will indicate why that is so.

The main thrust of the bill is with regard to the third of the offences, the wilful promotion of hatred, but, as I understand it, you have also had considerable discussion about the others so I will take these in the sequence in which they are found in the bill before us.

First of all, then, the genocide provisions: these provisions are related to the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations General Assembly in, I believe, 1948. This was subsequently signed and ratified by Canada. Now I believe that the bill, and the recommendations of the Cohen Committee, go beyond the international convention, and I believe they go beyond anything now in Canadian law. I recognize, of course, that since they go beyond the Convention, in my view they are not strictly a matter of obligation for Canada as a signatory and ratifier of that pact, but on the other hand I think it would occasion no surprise in this part of the 20th century—which might be called a century of genocide—if we were to take the spirit of that convention and elaborate it in a small but very important way.

The Cohen Committee did not challenge the view that genocide as such—perhaps I should not say “as such”—but that genocide was in effect prohibited by the present sections in the Criminal Code respecting murder. What we proposed was that it should be an offence to advocate or promote genocide, not to commit it.

Senator Walker: You are saying then that the Criminal Code covers this?

Mr. MacGuigan: It does not cover it under the concept of genocide, but under another concept, the concept of murder. While you could argue and we seriously considered the question whether we should go beyond this to make the commission of genocide a crime, we felt that we should not do that because there are provisions to cover this situation in the present law.

Senator Lang: Does the Convention only require the signatories to outlaw the act of genocide?

Mr. MacGuigan: Not only the act; I believe it goes on to conspiracy and incitement and complicity of various kinds. I do not have the text before me at the moment.

Senator Lang: And not advocating or promoting?

Mr. MacGuigan: Not as far as I know; but advocating or promoting even on an intellectual basis, or intellectual support for genocide as a solution to any human problem, was something that we believed should be an offence. We took the view, and this is a theme that runs throughout the Report, that there are certain bounds even to free discussions in a free society, and one of these bounds, the most important of them, is that it is never permissible at any time or in any place to make any suggestion that the solution for any human problem is to kill all the members of an opposing group, whatever it may be. Of course it is important to define the group, and to do it carefully, and one of my objections is that the government has not done that in the legislation before us. The Committee took the view that even a purely intellectual advocacy of genocide goes beyond what is permissible. It goes beyond incitement, because incitement would have to be in a situation where there was some immediacy. Canadian law has never adopted the “clear and present danger” of Mr. Justice Holmes which is the test in the United States. We have had a similar attitude in our own law, but this is one area where the Committee felt it was necessary to go beyond that.

The Chairman: Would you mind clearing up for me the “clear and present danger” test.

Mr. MacGuigan: Mr. Justice Holmes took the view that incitement to riot or sedition ought to be prohibited only when there was a clear and present danger that the acts uttered would have such an effect, but the situation had to be such that there was some likelihood that the particular effect that was feared would follow, either riot or sedition.

Senator Lang: Would that not be brought in as the qualification in our law where it says “likely to lead to a breach of the peace” in section 217?

Mr. MacGuigan: It is a qualification of that type.

Senator Lang: But that is already in our law.

Mr. MacGuigan: Yes, that is the type of concept generally in our law, but we are not suggesting that in the case of genocide.

Senator Lang: Has the "clear and present danger" principle ever been involved in any cases that you know of in the Criminal Law here?

Mr. MacGuigan: Not under that doctrine. That doctrine was developed under the American Bill of Rights, and we have only recently had our own bill of rights and we have not got into situations of this kind. Our law of incitement involves very much the same type of thing. There has to be a relationship between what is said in a particular situation and certain undesirable consequences that may follow. Now there is no doubt, I think, that in going as far as we have gone, the Committee has gone beyond any precedent in common law and necessarily beyond any precedents in this country, and we have done so for the reason that this is a socially unacceptable solution: we believe that it is socially unacceptable to advocate such a solution, even if you are speaking as a philosopher and not simply as a man inciting people to act in a certain way, because this is not an acceptable philosophic theory in a democratic society.

The Chairman: May I ask you to elucidate this a little; you say that the American rule is that the incitement must lead to some reasonably immediate effect?

Mr. MacGuigan: Yes.

Mr. Chairman: In this instance, if someone advocated genocide a thousand or a hundred years from now, would it not be ruled out by the court because it would be too remote? Would that not be the general common law with regard to present offences?

Mr. MacGuigan: When you put it that way, you make a difficult case.

The Chairman: Or a very easy one.

Mr. MacGuigan: Or a very easy one. I think the court might, in that case where there is a fantastic remoteness, say it was not advocacy or promotion. If, without mentioning any time, a philosopher, even intending his work for limited circulation, suggest at that one of the best solutions for today's problems was genocide, I think he would be guilty even in circumstances which would not normally constitute incitement. It was because we

went so far, but I think justifiably far, in what we were attempting to prohibit that we wanted to limit the definition of genocide to a very clearly defined class of offence. That is the reason we did not take the international definition, but modified that definition by leaving out two sub-sections proposed internationally, and while we defined "group" in the genocide section, it is again defined in what is proposed under section 267 B, so that it is now an identifiable group and not just any group.

Senator Lang: If that is so, why does the definition say that an identifiable group "means" rather than "includes"?

Mr. MacGuigan: This is one of the changes made by the government with which I strongly disagree. I think that this change leads to undesirable consequences and broadens the definition of "genocide" even beyond that of the international convention, and if you check our report you will see we used the word "means" and we said, "'genocide' means any of the following acts...". We left out what are now paragraphs (b) and (e) of subsection 2. I would also say—and this is a purely personal view, but I think in a sense it reflects the views of the committee—that the inclusion of paragraph (d) was a fairly marginal decision for us. I will try to indicate to you, as I go along, the decisions I feel were pretty marginal, not in the sense that we did not feel they are practical one way or another, but those which we felt only slightly more in favour of than against. There would be likely to be people who would be concerned that paragraph (d) would prevent contraceptive measures, even though there is "intent" written in above, "with intent to destroy in whole or in part any group of persons". It certainly would not weaken the meaning of "genocide" very substantially in my opinion, if (d) were to be removed as well.

We omitted paragraph (b) because "causing serious bodily or mental harm to members of the group" is not in Canada usually equivalent to murder, and we felt it should not be made equivalent to killing in this offence. We omitted paragraph (e) because we felt this referred to specific European conditions which had some meaning there during the Second World War period, but which are not likely to arise in Canada and are not the type of thing we really need to prohibit. Our feeling was that paragraphs (a) and (c) were sufficiently broad so as to include all the other

aspects which might arise at some point in time.

The Chairman: Are you advocating that we eliminate (e)?

Mr. MacGuigan: Yes, and (b).

The Chairman: And (b)?

Mr. MacGuigan: Yes. I am also suggesting that it would not make much difference if you eliminated (d). I cannot see, one way or another, that it increases the coverage, and it may cause certain uneasiness in the country.

Mr. Hopkins: Which of these five were recommended by the committee?

Mr. MacGuigan: (a), (c) and (d).

Senator Lang: What does "destroy" mean in your opinion?

Mr. MacGuigan: It would have to be physical destruction.

Senator Lang: It means "kill"?

Mr. MacGuigan: Yes, it means "kill".

Senator Lang: Why cannot we say "kill"? This involves a grammatical redundancy.

Mr. MacGuigan: The difficulty is purely a grammatical one. I suppose the words were taken from the international definition, but the grammatical difficulty is that if you say, "destroy in whole or in part any group of persons" there is some grammatical difficulty in killing a group of persons in part, and I think it was for that reason we used the word "destroy".

Senator Lang: But it brings in the concept of trying to break up a group, as opposed to killing people who are members of it. Using the words "destroy" and "group" in the same context, you imply an offence in advocating the disbanding of the group.

Mr. MacGuigan: I can see it is a possible interpretation. I think the weight would certainly be against interpreting "destroy" merely as the disbanding of a group, in the sense the people were dispersed. But that is, logically speaking, a possible interpretation.

Senator Lang: It is too dangerous a piece of legislation to leave any doubts in.

Mr. MacGuigan: If the committee were to feel there was doubt on that point, I think that is something that could well be cleared

up because there is no doubt but that we intended "kill".

Senator Walker: Paragraph (b) does not indicate killing; it says, "causing serious bodily or mental harm to members of the group;"

Mr. MacGuigan: I object to the inclusion of (b).

Senator Walker: If "destroy" means "kill", but we have not a legal interpretation it means that.

Mr. MacGuigan: You are right. The presence of (b), I suppose, strengthens the interpretation Senator Lang was suggesting as a possible one for the main part of subsection 2, so I think you have a point there, Senator Lang.

Senator Hollett: Unless you cut out (a), I suppose you have to do away with all war. For instance, in the last war I remember listing a thousand or two men to go overseas, and I advocated that they go to kill an identifiable group. I am innocent of anything, am I not?

Mr. MacGuigan: This raises the other point I wanted to make about the genocide provisions, and that is the fact that the group which is mentioned in the bill is not an identifiable group, as we defined it, but merely a group. My view would be that a "group" used in an unrestricted way would include, as Senator Lang was suggesting in his dialogue with the previous witness, the Mafia and any criminal gang, and even killing the communist Chinese, because it is not restricted to Canada. My view is it goes too far. The type of standard we should be establishing would apply to all groups in our country. I do not think this would apply to casual utterances like, "Get the Tigers!", if you are referring to the opposing football or baseball team, because I suppose that would be a jocose usage.

Senator Lang: It would come under "serious bodily harm"!

Mr. MacGuigan: Yes, and I think that problem arises when you have an unrestricted definition of "group". It would be very dangerous to pass the bill without having in it a restricted definition of "group".

The Chairman: If it were limited to an identifiable group in Canada, would not that cover the situation?

Mr. MacGuigan: We did not include the term "in Canada," but we certainly intended that. We used the words, "any section of the public" and because we used the phrase "of the public" we felt that it clearly meant the Canadian public, but it would be in keeping with our thought to insert the words "in Canada" to make it more clear.

The Chairman: Does murder cover killing abroad, or is it only in Canada?

Mr. MacGuigan: I think that murder in all the sections of the Criminal Code, without expressly being given extraterritorial application, would refer only to "in Canada".

The Chairman: I agree that was the case when the Code was drawn in the first instance, but since that time we have had extraterritorial jurisdiction given to us.

Mr. MacGuigan: In all instances?

The Chairman: I do not know about all instances.

Mr. MacGuigan: You mean that constitutionally we have that, but I do not think we have exercised that in the Criminal Code.

The Chairman: I do not think so.

Mr. MacGuigan: I cannot give you an offhand answer, but I would be doubtful if the offence extended beyond the bounds of Canada.

Since I was talking about the definition of "group," and since I have said basically what I want to say about the genocide offence, I will proceed to discuss "identifiable group" in preparation for discussing the two parts of section 267B. But perhaps before that time there are some additional comments on the genocide provisions that some of the honourable senators want to ask about.

Senator Croll: Go ahead. We will get back to it, if necessary.

Mr. MacGuigan: Very well. The definition of "identifiable group" was broader in our proposals. We proposed six identifying marks, namely, religion, colour, race, language, and ethnic or national origin. In its definition of "identifiable group" the Government omits religion, language, and national origin. I disagree with each of these omissions, although with differing degrees of passing.

I feel most strongly about the omission of religion. The group which has been subjected

to the most vile attacks in our country is the Jewish group. I realize that you have already had representations to the effect that many Jews do not consider themselves to be Jews by virtue of anything other than religion, even though they may not themselves specifically be practising followers of the religion. While the English precedent in this area is to leave religion out, I think we have to bear in mind the fact that in England the greatest thrust of hatred is directed against the so-called black million, and racial prejudice in England is not specifically directed at the Jews. But, in Canada, the group that has been most subject to attack is the Jewish group, and I think if we were to pass legislation which did not give them any protection we would be passing legislation which would have comparatively little effect.

A few moments ago it was mentioned in the dialogue with the previous witness that religion was not a natural fact, that it was something that someone could acquire and, therefore, not something that should be put in a category which contains other matters which are natural facts. But, religion is a quasi-natural fact, if I can put it in that way. Religion does not come to many people in our country by means of conversion. It comes to most people by reason of the culture and family into which they are born. While I do not want to exclude the possibility of people changing their religion, it is pretty close to being a natural fact in, I would say, the bulk of the population of today's world, and it is therefore appropriate to put it in some such grouping.

Another reason for omitting it would be the fact, I would think, that obviously every qualification or every distinguishing mark one leaves out of a definition of "identifiable group" the less likelihood there will be of an infringement on freedom of speech. I think we have to admit frankly that there is some infringement on free speech by legislation such as this. I believe it is a very justifiable infringement, but you can decrease the magnitude of the problem by cutting down on the number of these characteristic marks. If you cut them out altogether perhaps you would be worse off, but if you cut them down to one then you do infringe less on free speech. This may have been in the Government's mind in leaving it out.

The Chairman: Speaking of infringement of free speech, are we not limiting only evil speech—evil speech and evil thoughts?

Mr. MacGuigan: Yes, I would certainly agree with that, but one of the difficulties is that this is rather like the old distinction between liberty and licence, when we know that one man's liberty is another man's licence.

Senator Lang: Or, what is one man's evil is another man's good.

Mr. MacGuigan: One has to be conscious of the fact that there is a valid dialogue between different points of view, but with respect to genocide that is not so. We have drawn this legislation in such a way as not to have any dialogue with respect to genocide. There should be an absolute provision in respect of genocide, because there is no social interest served in having a dialogue on the question of whether or not you should kill people as a solution to the world's problems. I distinguish that sharply from any other questions that arise.

Senator Lang: Would you give us your thoughts on the word "language" in that regard.

Mr. MacGuigan: The omission of the word "religion" is the one about which I feel most strongly, but I would certainly be in favour of keeping the word "language" in. This, of course, gets us into more ticklish areas in present day Canada, but my feeling is that there is a good case to be made for having ground rules of decency, if you like, in the social dialogue which occurs. I see no reason, if we are going to dispute on a linguistic basis, why we cannot say what we want to say in polite terms, at least, and a certain amount of human decency.

Senator Lang: Are we writing ethics or criminal law?

Mr. MacGuigan: One does not write criminal law without writing ethics. I have taken a strong position in the other house against having private matters and private behaviour controlled by the Criminal Code, but when you get into matters of public morality, then that is what the Criminal Code is all about.

Senator Lang: What if these statements are made in private?

Mr. MacGuigan: The occurrence may be in private, but my argument would be that it is still a matter of public morality because it is a matter which has such serious effects on people across the country. Matters affecting the public cannot be restricted to what hap-

pens in a public place. There are certain acts that may occur in private—I am thinking, for instance, of a father's relationship towards his children; his lack of support of them, or mistreatment of them—although those acts may occur within the privacy of a family setting they are of public consequence.

Senator Lang: I assume you are talking about the homosexual provisions of the Criminal Code. I should like you to bring those into line with the thinking in subsection 2.

The Chairman: Do you think we would have some difficulty in identifying the group on the ground of language?

Mr. MacGuigan: I think there is some difficulty.

Senator Walker: And not just difficulty. It would be an impossibility, would it not?

The Chairman: I would think that that is why it is left out.

Senator Walker: Do you not think that that is why they left it out?

Mr. MacGuigan: It is not an impossibility because the Royal Commission on Bilingualism and Biculturalism has laid down rules as to what constitutes linguistic status, and what does not. There is something there which without further specification might cause problems. It is not the language which a person actually speaks, or his name, which determine his status. If a person grows up in a community with one language, and his ancestors actually were of another language which he may still speak, you do have a question as to what linguistic group he belongs. But, in that case, whichever linguistic group he were to attack, whether it be his own or the other, this may still be something that ought to be prohibited.

I do not know that the indefiniteness of the group is necessarily a prohibitive problem, because if someone makes an attack on a linguistic group, the fact is that he has made an attack on a group as a linguistic group, and whether or not he means it to include all six million people of that group, or whether he includes only two million, is not really a crucial point in the determination of his liability under the section.

The Chairman: Would you give us your idea of what an ethnic group is?

Mr. MacGuigan: We used that word in its common meaning in Canada. For us, it not only meant people from the continent of Europe, but we coupled it with national origin, which I think broadens it a little bit. "Ethnic" for us has a more restricted meaning than does "national origin". I suppose, from the dictionary viewpoint, there would be no justification to restricting the term "ethnic" to people from a particular set of countries, but that is, in fact, what we do here in Canada.

Senator Lang: You know what it originally meant, do you not?

Mr. MacGuigan: Yes, I saw the previous proceedings.

Senator Lang: It meant "Christians". The Christians were the foreigners outside the cities of Greece and came from the Middle East.

Senator Choquette: Before you leave that point, I should like to ask a question. I think you told us that the Criminal Code took care of genocide in a general way. What would you say if we added to that section that anyone who promotes or advocates the acts set forth in the murder section should be guilty of an indictable offence and liable to five years imprisonment, rather than putting in this whole section 267A? What would you say to that?

Mr. MacGuigan: I think that legally there might not be very much difference between that way of doing it and this way, in the sense of strict interpretation. I would suggest that the law has a very important educational function, and certainly one of the very important purposes of the legislation is the taking of a strong moral position by the people of Canada through their Parliament—if this does receive the approval of Parliament—on basic questions such as this. I feel the moral force we want to summon to disapprove very strongly of any suggestion of genocide in today's world should be underlined, so I would say there is a very weighty reason for not doing that, even though legally speaking there would be no difference between the two.

The Chairman: Is not there a distinction to be drawn between murder and genocide?

Mr. MacGuigan: There is, yes, but I made the point earlier that we felt that as far as actual killing was concerned the present crime of murder pretty well covers the ground, in the sense that if you can get any-

body for committing genocide you can get them for committing murder. After all, anybody killing people is guilty of murder.

Senator Choquette: What are your views on the proposed amendment to abortion laws?

Senator Croll: What has that got to do with killing?

Senator Choquette: Is that advocating killing?

Senator Croll: He has already...

Senator Choquette: Let the professor answer the question.

Senator Croll: In the first place, I think the professor has already answered it in the House of Commons, if you follow the proceedings of the House of Commons.

Senator Choquette: I don't care about the House of Commons.

Senator Croll: Well, you ought to care about something besides the Senate and find out what is going on around you.

Senator Choquette: Oh, come on now!

Senator Walker: I object, Senator Croll. You are the last person in the world who should be lecturing this man.

Senator Croll: I have been sitting around this table longer than you two have. I have been sitting here for a long time.

The Chairman: Order! Will you please address the chair.

Senator Croll: I have been in the Senate for too long to listen to that.

Senator Walker: I have been ashamed of you the whole way through this sitting.

Senator Croll: I hope you have.

Senator Walker: You are the phoniest person in the Senate. You are a hypocrite.

Senator Prowse: Oh no. Mr. Chairman...

The Chairman: Order!

Senator Croll: Coming from him that is a compliment.

Senator Walker: We all know about your background.

Senator Croll: My background?

Senator Walker: Yes, your background.

Senator Croll: I wish you would tell me about it.

Senator Prowse: On a point of order...

The Chairman: Gentlemen, stop it. We have business to transact, and a very serious piece of business too.

Senator Choquette: I have asked a serious question, Mr. Chairman.

The Chairman: Senator Choquette has the floor.

Senator Choquette: I asked a question and I am expecting an answer.

Mr. MacGuigan: I answered that question in my speech in the House of Commons, in which I said I strongly disapproved of abortion. I also said at the same time, for reasons I will not elaborate today, what my reasons were for choosing the lesser of two evils and supporting the Government legislation. I would be pleased to send you a text of my remarks.

Senator Choquette: Thank you.

Senator Lang: You disapproved of advocating abortion.

The Chairman: Let us get back to our work, gentlemen.

Senator Prowse: When we discuss providing protection against the promotion of genocide, if you relate that purely to murder itself is not the difficulty that murder is an act committed against an identifiable individual, and we are dealing here with the result of the act rather than the exact act itself.

Mr. MacGuigan: Yes, this is true. We lose the whole meaning of what we are doing if we put it just in terms of murder.

The Chairman: That is why I asked if there was not a distinction between murder and genocide.

Mr. MacGuigan: In our present national context the phrase "national origin" I suppose is a difficult one because we have, as you all know, different meanings of "nation" and "nationality" going around. This may be one reason why it is better to omit the word. Perhaps there is another word such as "ethnic" or the phrase "country of origin" that could express the same intent.

Senator Lang: I wonder how this is translated into French.

Senator Prowse: Do you have anything to improve on what you say in the report at page 70, where you state:

"Identifiable group" means any section of the public distinguished by religion, colour, race, language, ethnic or national origin.

In your opinion, would any of these things improve this definition?

Mr. MacGuigan: I am sufficiently immodest, Senator Prowse, to think that our report cannot be improved upon!

Senator Prowse: I am inclined to agree with you.

Mr. MacGuigan: In section 267B there is provision for two different offences. The first is the one described as "Public incitement of hatred," which is doing something in a public place that has the effect of inciting hatred. There are provisions of the Criminal Code presently that come close to this. The ones relating most directly to it are sections 64 and 67, which deal with unlawful assembly, and then section 160, subsection (a) (i), which is the offence of causing a disturbance. Unlawful assembly is defined in section 64 and made an offence in section 67. The difficulty with unlawful assembly is that it requires proof that three or more persons had assembled with intent to carry out the common purpose. This was used against the Nazi group in Toronto, but they were acquitted on the charge under section 67, because the common intent could not be proved. The onus here is very difficult to meet, because it involves the Crown's knowing, not just what happened at the meeting, but the relationship between the accused men before the meeting and what may have transpired between them. The Crown has then, in effect, to prove a kind of conspiracy, which is very difficult to establish.

Section 160 probably covers very much the same ground at what we propose. Conceptually section 160 provides that:

Every one who...causes a disturbance in or near a public place...by using insulting or obscene language...is guilty of an offence punishable on summary conviction.

It is probable that "insulting language" includes the type of abuse that we would

proscribe under section 267B. There is a possibility insulting language might be taken in purely an individual sense and would not be taken to refer to a group as a whole. I think the odds are that it would probably cover the same ground.

Senator Lang: There is no breach of the peace required in that.

Mr. MacGuigan: No, this is a problem with section 160 because "a disturbance" is not a phrase which has a common law history. The phrase which has had is "a breach of the peace," and it may be that causing a disturbance is something less than a breach of the peace. Shouting, for example, just shouting itself, may be considered to be causing a disturbance, and there could be a conviction, I think, under section 160 where there was nothing which would very closely approach a breach of the peace as the common law has understood that phrase. I must say that I find section 160 to be a very unsatisfactory section from the viewpoint of civil liberties as well as from its indefiniteness in regard to these matters. This part of it is a kind of catch-all. Some of the rest of section 160 has a long common law history. This part of section 160 was added and I am not aware of any tradition of interpretation which would enable us to be very certain of its interpretation. Indeed, it is seldom appealed because it is punishable only on summary conviction.

Now, it has been alleged that what we propose would deny free speech by making what could be called retaliatory disorder an offence. When a speaker arises to speak, he might be convicted just because of the audience's reaction to him. One could think of a situation in which political or religious opponents of a speaker would congregate together specifically for the purpose of having him thrown in jail by causing a disturbance at the time.

Senator Lang: Martin Luther caused a lot of disturbance. That is an unfair question to you.

Mr. MacGuigan: I think it is a fair question. Martin Luther King I think probably caused even more disturbances.

Senator Lang: Seriously, they could be liable for a charge under this section.

Mr. MacGuigan: Not under the one we are proposing, they could not.

Senator Lang: Why?

Mr. MacGuigan: I think they could under the present section 160. This is one of the things which, as a civil libertarian, concerns me about the possible interpretation of section 160. Under our proposal the speaker must communicate statements which incite hatred or contempt. He is not to do something very positive which would be judged by a reasonable man to be guilty of inciting hatred or contempt.

Let me pause at this point. I have not mentioned this before. In regard to these words, hatred or contempt, I regard the inclusion of the word contempt as one of our more marginal decisions, and I do not think very much would be lost if "or contempt" were dropped. The original phrase was "hatred, contempt or ridicule" and this is in the present section of the Criminal Code on defamation. We are here talking about a concept of group defamation. We thought ridicule was too weak to carry over and maybe contempt is also too weak. The only thing that should clearly be retained is hatred. We have maintained "contempt" by way of maintaining an old common law formula. Not much would be lost if it were dropped. What would remain are the proposals which proscribe statements which would cause hatred.

The Chairman: Hatred and contempt mean about the same thing, do they not?

Mr. MacGuigan: Well, I am not sure that they do any more. There is certainly a sense in which they do, but when you try to get the shades of a meaning today of a word like contempt I think you can see it as being much less than hatred. You might have contempt for a person. In a way contempt is worse because it may mean that you have a less favourable judgment about the person's ability. It may convey that meaning, but it also means you do not dislike him as much. There is more dislike involved in hatred than in contempt, it seems to me.

Senator Walker: You could have contempt for a person, but still feel sorry for him.

Mr. MacGuigan: That is true.

Senator Prowse: If you hated him you hardly would.

Mr. MacGuigan: Yes. I suggest the Committee recommendations are limited in scope in four ways, so that when a Martin Luther King rises to speak he cannot lose his right to do so by the reaction of the audience.

First there is criminality only for statements communicated in a public place and secondly, the statements must be such as to create hatred or contempt for identifiable groups.

The Chairman: It must incite them.

Mr. MacGuigan: The identifiable group protected is limited to certain defined sections of the public. Finally the statements must be of such a character as to be likely to lead to a breach of the peace. The significance of the word "is likely to" is that the police have the option of stopping the thing before the speaker has actually been shot or knifed by somebody. In other words, the furor may simply be beginning, but if he has said things...

Senator Lang: Anticipatory arrest.

Mr. MacGuigan: Anticipatory to the total reaction of the audience, but not to his having said hateful things. He must first utter the hateful things. A situation arose in the *Jordan v. Burgoyne* case under the new legislation in England, and the police, after the original utterances of Jordan, were able to get him out of the way. They were able to do this before he was assaulted by the people that were there. Those of you familiar with the happenings in Toronto in recent years where there have been riots involving up to 5,000 people in Allen Gardens realize that this could very well be an important power for the police to have. As a matter of fact, one of the things I want to suggest...

The Chairman: You say unnecessary power?

Mr. MacGuigan: I would say an unnecessary power, yes.

Senator Haig: What is the definition of a public place?

Mr. MacGuigan: A public place is defined by both the Cohen Committee and this legislation as any place to which the public have access as a right or by invitation expressed or implied, this is the definition of public place found elsewhere in the code and repeated here only because it applies exclusively to a particular section of the code. We were using it in a different part and repeated the same definition.

Senator Haig: If I rented a hall and invited people to come to hear a vicious speech, could I be arrested?

Mr. MacGuigan: I believe so, yes. For one thing, in this case we do not say public place "means", we say public place "includes", so the definition is not necessarily restricted just to the wording here used, but I think that a rented hall would be a place where the public are invited. It does not have to be open to every Tom, Dick and Harry, but enough of the public is invited to make it a public gathering. A more difficult situation would be where you have a meeting in your house, in an ordinary house. This would probably in no circumstances be a public place.

I suppose if you were a Nazi leader and had built a big hall onto your house this might be considered a place of public assembly. It certainly would not include the ordinary living room situation.

The Chairman: Unless the public has access, a right or invitation expressed or implied.

Mr. Hopkins: If everybody is invited.

Mr. MacGuigan: If everybody were invited, yes.

The Chairman: The public.

Mr. MacGuigan: If you had 12 people invited to your living room I do not think this would make it a public place.

Senator Prowse: If you would announce publicly that you were home at such and such a place between 8 and 10...

Mr. MacGuigan: In that case it would make your house a public place, that is if you were having a public party of some kind.

So I would say that the four requirements which I suggested have to be present before there is liability under section 267B(1) mean, all in all, that there must be a causal connection between the speaker's words and the ensuing disturbance, or at the least the probability of an ensuing disturbance, and that the result must be foreseeable and probable in the light of the provocation. A disturbance must be at the very least the probable consequence, and it would be of course judged by a reasonable man.

It is clear from the English case of *Jordan v. Burgoyne*, where Colin Jordan was convicted, that it does not have to be presumed that the audience was reasonable. If you are speaking to a group of concentration camp survivors and you say things to them which would incite them to retaliation against you,

you might stir up the audience, although you would not be guilty without objectively causing hatred.

You have to take the audience as you find them, that is like the old tort rules that you take your victim as you find him. It cannot be supposed that the audience is a group of abstract philosophers who have had no concern or feeling for the situation. So, there is with respect to the consequences a complete judgment that is made and it is not just an abstract judgment.

With regard to the question of causing hatred, the statements which are made have to be objectively, in the judgment of a reasonable man, capable of causing hatred and obviously not just subjectively causing it.

Senator Lang: Or at least a reasonable policeman.

Mr. MacGuigan: I was assuming that a reasonable policeman would fall into the category of a reasonable man.

Senator Lang: A very large assumption.

Senator Walker: In the Criminal Code, causing a disturbance, does not that go pretty far? They do not have to have a donnybrook before the police can make an arrest, do they?

Mr. MacGuigan: No.

Senator Walker: And it has to be just on almost anything which can be termed or defined as causing a disturbance, rather than some chap up there inciting a crowd. Do you think we need to go any further than that at the present time?

Mr. MacGuigan: On the broadest possible interpretation of section 160, we do not need to go further for anything that can happen in public, as it is only an offence punishable on summary conviction.

I must say I personally hope that section 160 will be amended, taking into account the kind of qualifications that we are putting into this section. What we are putting in is much safer than what is in section 160, because it is more carefully defined. This is an indictable offence as well. I would hope that the Government would take cognizance of the situation and would propose an amendment which would limit in some way the effect of section 160 as it applied to this type of situation.

Senator Prowse: Where section 160 has been used for as long and as often as it has, it

has come to have an obviously precise meaning as far as police law enforcement is concerned, has it not?

Mr. MacGuigan: Yes.

Senator Prowse: And it is becoming even narrower even than it was.

Mr. MacGuigan: In the usual magistrate's court context, it is, yes. And I think it is probably doubtful that a prosecutor would use it in the larger sense. In that way, one might find it harmless, but I would be happier if the Government would amend the section.

Senator Prowse: And make it more safe.

The Chairman: Well, we have not section 160 before us at the moment. In the interest of progress, we have discussed section 267B(1) at some length. Are you satisfied that we pass that as it stands?

Mr. MacGuigan: I would like to say one more thing about it, if I may, Mr. Chairman. That is, if the Government of Canada does not take action with respect to this problem of public order, it is likely to find that city councils across the country will either be forced into taking action or think they are so forced.

I want to refer to the Toronto situation. I wrote an article some years ago in the *Saskatchewan Bar Review* in regard to what occurred in Toronto in 1965-66. There was a very serious situation which occurred as a result of meetings, which were held by a young Nazi leader there. The city council felt at one point that they had to end their open parks policy and as a result of that the Nazis were subsequently refused permits for meetings in the parks. Later on the city council thought the better way to approach it would be to make a park by-law which would in effect amend the Criminal Code, namely, that no person shall use abusive language in a city park, and so on. At that point they were willing to permit the use of the parks again, but when they established this rule of conduct, a magistrate later found it to be under federal jurisdiction because they attempted to control what was happening in the park. Beattie, the Nazi leader in Toronto, was arrested under it and was later acquitted by the magistrate on the ground that this council by law was ultra vires and came under the federal Criminal Code.

I would suggest that if we do not take some action here, we risk the continuance of this type of thing, and also that vigilante groups may take the law into their own hands, because they see a genuine problem here to which the law does not appear to be responsive, since section 160 does not appear to take cognizance of it, even if in an extended sense it could do so.

I think this is a matter in which there should be a national decision by the Parliament of Canada, rather than one on which the city councils across the country should try to make their own laws.

Senator Walker: What happened as a result of that?

Mr. MacGuigan: He was acquitted on that, but later on he was charged and convicted of something else.

Senator Walker: What was it? Was it under section 160?

Mr. MacGuigan: I do not honestly recall that, because I had ended my article—I wrote the article in 1966 and ended my article before Beattie had been tried on the later count and I have not done the research since that time. I do recall that he was convicted of something else. The facts of the matter could be found out.

Senator Walker: He is out of business now.

Mr. MacGuigan: He is not, in fact he is back in business again now, through the telephone. He has not stayed out of business.

Senator Lang: What we are really doing is we are saying now that, because of the seriousness of the situation we are not any longer going to use the police force against the rioting crowd, but we are going to arrest the person who is causing the crowd to riot. We are shifting the focus.

Mr. MacGuigan: I would not accept that suggestion, senator, although that is what we would be doing in this particular provision. But it is a matter of considerable distress to me, as a matter of law interpretation and law enforcement, that in at least one of the cases in Toronto, it was only Beattie who was arrested—and not some of the crowd who had been causing the disturbance. They should have been arrested also. What they were doing was also illegal under the Criminal Code. We do not have to pass any legislation

to make them guilty. There may be difficulty in getting the police to enforce it.

I am suggesting that one of the reasons that makes the crowd so violent is the feeling that there is no other way of getting at the person. They think that if they do not get him, he gets off. I think that this adds fuel to the fire of their passions.

Senator Lang: We may be getting to the stage where people would pretty soon be able to organize a riot against some people for the purpose of getting him arrested—and this is not an unknown technique.

Mr. MacGuigan: Of course, I suppose that he could temporarily be taken into custody, but he is tried by the court...

Senator Lang: While he is in custody, he is in jeopardy, his speech is over.

Mr. MacGuigan: Yes, his speech is over, that is right.

Senator Croll: But the policeman's job is over, too, when he appears before the magistrate and gives the reasons why he did it—he has not got a long life with the police force.

Senator Lang: This was the technique used by the Nazis in the early days in Germany, to suppress people speaking out against them.

Mr. MacGuigan: Yes. I trust our police force here to a greater extent than that, although I believe they can be subject to pressures.

Senator Croll: And our judiciary, too.

Senator Lang: The speech is over.

Mr. MacGuigan: Yes, that particular speech. As I said before, when it gets before a judge, the judge may set the man free, but the police, acting in concert with the crowd, have prevented the speech being made. While I do have some apprehension about the police in relation to their consciousness of civil liberties, that is not one of them precisely. I think the police tend to have very good judgment on that kind of thing.

Senator Lang: That is a matter of opinion. We are talking about law here.

Mr. MacGuigan: Yes.

Senator Lang: I am trying to underline here that we are on a slippery path in this area.

The Chairman: Gentlemen, there is not very much innocence about a speaker who incites hatred or contempt against an identifiable group.

Mr. MacGuigan: With respect, Mr. Chairman, Senator Lang's point is not that the speaker would have said this but that by alleging that he said it the crowd could have him arrested by the police, if the police complied with the crowd. They could stop his speech.

Senator Prowse: Some slicker could come along and say he heard the guy say something wrong and the police would come along and arrest him before he could make his speech.

The Chairman: They could not do it according to this act.

Senator Lang: We are talking about the practical application of the law.

The Chairman: Its misapplication.

Senator Lang: The practical application of the procedures under this section.

The Chairman: We must go on, because time is passing and we want to hear from Mr. MacGuigan on some of the other clauses. I ask Mr. MacGuigan whether, after this discussion, which has been of considerable length and has been very deep, are we not safe in passing this section as it now stands?

Senator Lang: What does "safe" mean?

The Chairman: Well, wise.

Senator Walker: I thought we were going to decide that.

Senator Lang: I thought that was the committee's job.

Senator Walker: We should not ask the witness that. That is our decision to make.

The Chairman: Put it in another form: Have you any objection to this section as it now stands becoming the law of Canada?

Senator Prowse: Mr. Chairman, I think at this stage, if we have heard all the witness has to offer on this section, we should go on. We are only taking evidence. We are not making any decisions at this point, with all respect, sir.

The Chairman: Very well.

Mr. MacGuigan: Were you asking me that question, senator, or the committee? If you

are asking me, I am quite prepared to say that I see no reason why you should not pass this section.

The Chairman: All right, thank you. Let us get on to another section.

Mr. MacGuigan: Finally, the third offence, which it seems to me is really the principal thrust of our committee report, in the sense that it is really here that we are breaking new ground in the law in a most decisive way, that is, with an offence which we might call by the name of group defamation. This is the concept, even though that is not the way the crime is described in the Code.

Group defamation was unknown to the Common Law. We have had for centuries, of course, law on defamation, but not law on group defamation. We have only had defamation with respect to individuals. The reason for this is that the law itself did not take cognizance of groups themselves. Groups were something unknown to the Common Law. The Common Law did not understand groups. As a matter of fact, the people of past ages did not understand groups in the way we are able to do now through social psychology. We now know, for example, that it is an important part of a man's psychological makeup that he belong to a particular group, depending, of course, on the naturalness of the group and the meaningfulness of the group to him. In the case of a meaningful group, his membership is something which is very meaningful. It is not something which just happens. In the case of the groups that we are here concerned with, it is a matter of their innate importance.

The committee proposed to extend the traditional Common Law with respect to defamation against individuals to defamation against groups, or rather to individuals in their capacity as members of groups. It used to be that, if you said group "X" was characterized by certain non-desirable traits, the law—and this is in fact still the law—would not attribute those traits to any man who happened to be a member of the group, and therefore would say that this was not a harmful statement because it did not affect anybody. But now we know that when this type of statement is made about a group it is something which the members of the group also feel is made about themselves, depending upon the closeness of the group to them. It is as a result of our 20th century understanding of groups that we now see the need for legislation in an area where we previously had no

concept of it. We can even project in long-range terms for the rest of the 20th century and the 21st century and say that there is probably no greater problem in the world than that of group prejudice and group discrimination: being against somebody and hating him because he happens to be a member of a particular group.

If there is one thing we have to deal with very effectively in our law and social policies in this century and the next, it is this problem of group censorship, prejudice and defamation against people merely because they are members of a particular group.

Most important countries of the world now have legislation against group defamation, with Canada and the United States being two of the exceptions. But in the United States the Supreme Court has upheld the constitutionality of such legislation in the case of *Beauharnais v. Illinois*, under the United States Bill of Rights, and there is no legal reason why such legislation should not be passed.

Senator Lang: How could they uphold its constitutionality, if they had no such legislation?

Mr. MacGuigan: There was an Illinois by-law, or it may have been a city of Chicago by-law, which they were concerned with at that time. I have the impression that it is no longer in effect. I cannot verify that, but I do have that impression. Certainly, if it is in effect, there are not yet many other examples in the United States, but two or three years ago legislation which would have made group defamation a crime in New York was passed by their legislature, but it was vetoed by Governor Rockefeller.

The principal problem in the United States is that this is a matter which comes under each individual state because their criminal law is not a federal power and therefore it is not something which can simply be done by a national piece of legislation. It has to be done by each state. There may be some states that have this law.

Senator Walker: Was it ever brought up in New York again?

Mr. MacGuigan: I cannot tell you that. I must admit that I have not done research on this subject for about two years.

Senator Walker: Do any states in the American union have a bill similar to this one, or one with similar sections?

Mr. MacGuigan: I am not aware of any.

Senator Walker: There are none.

Mr. MacGuigan: I am not aware of any.

The Chairman: You are addressing yourself to subsection (2).

Mr. MacGuigan: That is right.

The Chairman: I see here that it is by communicating statements. Would that include recordings?

Mr. MacGuigan: Yes. "Statements" is defined to include words either spoken or written, gestures, signs or other visible representations. I think spoken words would include recordings, but, certainly, if it were decided to make that more explicit, it could certainly be defined to include recordings. The word "communicating" we used instead of the traditional Common Law word publishing. Having read Marshall McLuhan, we felt that communication was a more contemporary word than publishing. The common interpretation of publishing is that it is printed. The real legal meaning is to communicate in any way, but it was decided to use the word communicate instead.

Senator Walker: That would cover the tapes, would it?

Mr. MacGuigan: I think it would.

Senator Walker: On a telephone? Have you considered whether the Bell Telephone are right in suggesting they have no power at the present time to stop the renting out of telephones for people to use in this shocking way?

Senator Lang: It is just a gadget.

Mr. MacGuigan: I have read their statement and I have read the proceedings of your hearings. I have not done any research however, so I cannot pass any opinion on it.

Senator Lang: If I may, Mr. Chairman, I would like to request an opinion from the Department of Justice as to the liability of the Bell Telephone Company to provide a recording device on the telephone to any subscriber who asks for it.

The Chairman: Irrespective of what he is putting over the line?

Senator Lang: Yes. I think this is important because my general knowledge would lead me to believe that a common carrier like Bell Telephone is obliged to put in telephones or provide them under certain circumstances, but I cannot conceive of its being obliged to attach a recording device to it simply because a subscriber asks for it. We could very easily seek a legal opinion that would clear up that point.

The Chairman: But I am wondering what business that is of ours.

Senator Lang: We have had evidence from a Bell Telephone witness at a previous hearing that that was the case, and I would like to know if that was correct, and I would like to have a legal opinion on it.

The Chairman: I have no doubt the Department of Justice has taken cognizance of the statement made to us on that occasion, and it is for them to determine whether or not a prosecution should be laid against the Bell Telephone Company. Could we justify asking such an opinion in view of our responsibilities towards this particular bill?

Senator Lang: I would think so, because we have had an opinion expressed here that without different legislation they would have no power to withhold the attaching of such an instrument. Now I would question that opinion and I would like to have the opinion of the Department of Justice on it.

The Chairman: Is the committee satisfied that I should ask the Department of Justice for an opinion of this kind?

Honourable Senators: Agreed.

The Chairman: Very well, I will do so.

Mr. MacGuigan: I will try to conclude my remarks fairly briefly. I was speaking about the fact that Canada and the United States were the two main exceptions up to now with regard to group defamation, but we do have the persuasive example of Great Britain where not only the Public Order Act of 1936 provided an example of what is now being proposed in subsection (1) of this clause, but the Race Relations Act of 1965 covers what is proposed in subsection (2). In both cases the British versions are much more extreme than what is here proposed and go much further. I am not going to defend it, but the British have felt that they could go further than we have gone without infringing upon what they

consider to be the most important aspect of freedom of speech.

Senator Lang: But all prosecutions are subject to a fiat being first obtained from the Attorney General?

Mr. MacGuigan: This was one of the marginal decisions for us, but we more or less recommended that no conclusions—well, the last paragraph of our report reads as follows:

The Committee considered the advisability of requiring the consent of the Attorney-General of the Province or of Canada to each prosecution instituted under the legislation proposed in order to prevent frivolous or unwarranted prosecutions, and without making any recommendation, we draw the Minister's attention to this possibility.

So, we did not make any recommendation and I should not say we favoured it, but certainly there is nothing inconsistent in the report with doing that, and I personally think it would be a very good idea.

Senator Walker: There is nothing in the bill for such a check?

Mr. MacGuigan: No.

Senator Walker: Would you be in favour of such a check?

Mr. MacGuigan: Yes, and I would say the committee teetered on the brink of making this recommendation but it did not do so.

I do not think we need to rest the case for legislation on the example of other countries. I think we have had the experience in Canada since 1963 of a wide-spread dissemination of hate propaganda in very many forms, some of it indigenous and some imported, much from the United States. We have had huge public meetings in Toronto, especially, which have revolved around people who have attempted to propagate hate materials, hateful statements. Accordingly, most of them were not there by way of agreement, but the fact is they were there and there were consequences which resulted from this. This is part of what Senator Lang was talking about in the beginning.

I think I really would be infringing on the time you have allowed me if I went into all those instances, but they are all set out in one of the early chapters of your report and I think you will find that is a very useful summary, up to that time. However, I would say

that even more important than the quantitative aspect is the qualitative question, if I may use that term with respect to such odious materials as these hate materials.

In recent years social psychologists have discovered the effectiveness with which all kinds of persuasive communication can touch people in their attitudes. We commonly believe that anything can be sold if it can be effectively marketed. Social psychologists have at least a suspicion—and really more than that—that this is just as true of hate as anything else, and studies made by the Ontario Human Rights Commission have suggested that racial and religious prejudice are very widespread in Toronto and that that city might be considered fertile soil for the growth of race hatred. It is very hard to make judgments such as that, and I do not advance that one with any great confidence, but it is a judgment which has been made as a result of a particular study, and I think we have to give it certain weight.

The fact is that in this area, despite all the researches of social scientists, we do not know how much damage can be done. We do know enough to know that when we attack people's group allegiances, we are treading on something pretty basic to their nature, and we have not only the danger of arousing the majority of the population against a minority—and this is a very serious danger, especially in a situation where you have a social crisis—but we also have the danger of destroying the minority's feeling for themselves. This is something which has not really been studied in Canada, and I cannot tell you much about Canadian experience, except that there was a newspaper study in Toronto of Jews, which indicated they had an underlying feeling of uncertainty and apprehension.

In the United States these effects have been studied fairly thoroughly in the Negro community, and one thing which gives emphasis to black power is that these people are going against the normal effect on their group and are becoming proud to be black. Negroes in America have not been proud to be black but have been ashamed to be black. Negro children, given a choice between a black and a white doll, always take the white doll, which indicates the feeling of lack of worth they have.

We know it is likely to be fairly serious, from what we do know about its influence on people; and the protection of the target group from propaganda is, to my mind, much more

important than the desirability of protecting the minority, in a physical sense, from what a majority may do to it, because I think we can rightly feel in a country like Canada it is going to take an awful lot to stir up the majority in any violent way against one of our groups. Perhaps I am unduly complacent in feeling that, but I think that this is not the greatest worry in this field. To me the greatest worry is what is being done to the target group. This is well documented in the literature of social psychology, but, not being a social psychologist, I would be attempting to cover very inadequately what someone else can cover in more detail if I were to say anything about it. But, you can read the chapter on this in the report, and also Dr. Kaufmann's excellent study in order to get some idea of the seriousness of the problem.

Senator Walker: So far as public manifestations are concerned, the only example is that provided by Beattie about five years ago.

Mr. MacGuigan: Yes. Well, he is not the only one. Others were involved with him, but his is the principal example.

Senator Croll: No, Beattie has been performing right until recently.

Mr. MacGuigan: Yes, that is right.

Senator Croll: There is a performance going on now in Vancouver that is even more ferocious. Are you aware of that?

Mr. MacGuigan: No, I was not aware of the Vancouver situation. I would not agree that this is restricted to five years ago, but I think Beattie has been the principal actor in this type of agitation in Canada.

Senator Walker: There has been no disturbance since the incident in Allen Gardens, when he was arrested. That is my point. I know he is working on this telephone business, which is a shocking thing, but there have been no public disturbances as a result.

Mr. MacGuigan: I have the impression that the City of Toronto has kept these people from having meetings. I think that is why there have been no meetings.

Senator Walker: Quite so, even though it is quite illegal.

Mr. MacGuigan: It may not have been legal, but it has been successful.

Senator Lang, in the beginning, was inquiring as to the background of the legislation. I

am not sure that I really appreciate to what he was referring, but I can say, as a member of the committee, that this legislation did not come to us from any outside source. Not only did it not come from outside the committee, but it did not come to us from another country. This was really an indigenous product. It was something that we worked out as a result of slow and careful deliberation, and I think you can say that the terminology of our recommendations is quite unlike anything that exists in England, for example, or that which exists in our own Criminal Code with respect to defamation. With all respect to the original drafters of the Criminal Code I think there should be in it an unqualified defence of the truth, and with pardonable pride of authorship I hope that this is something that will be added to that section of the Criminal Code. This is something that was really the product of the committee itself.

Senator Lang: How was the committee struck?

Mr. MacGuigan: I cannot tell you why the committee was struck.

Senator Lang: You see, it antedates Beattie. Governments do not just strike committees out of the blue.

Mr. MacGuigan: The problem was there in Canada, but as to the reason for the appointment of the committee—

Senator Lang: I could understand it if there were a lot of riots, and we were in a desperate situation, but at the time the committee was struck I do not think there was a public demand for—

Mr. MacGuigan: Well, there was a distribution of literature. All I can recall is being called by the then Minister of Justice on a Sunday afternoon, he said that he was gathering together a group, which included this interesting fellow, Pierre Trudeau, which he hoped would engage in a study of the problem.

Senator Croll: Do you not recall that at the time there was a great deal of this sort of literature in Canada. It had been coming in from the United States, and had almost reached the point where it was flooding the country, and it was felt—I think it was in 1963 or 1964—

Mr. MacGuigan: We were invited to become members in, I think, November of

1964. The appointment was announced in January, 1965.

Senator Croll: At that time these men had almost come to the point of riot and they decided to set up the committee.

Mr. MacGuigan: The factual background is in our report and I need not delineate it. Certainly all these things happened. I cannot tell you the reasons the administration had for deciding to do this other than the fact that there were factual incidents which led them to do it.

The Chairman: May I say that Dean Cohen will be before us, not before the recess but very shortly afterwards. He is thoroughly familiar with what took place prior to the formation of this committee. Senator Lang's statement at the commencement of our sitting this afternoon on what preceded the appointment of this committee is cogent. However, let us wait till we have somebody here who really took part in it in those days.

Senator Fergusson: Is it not the custom for Canada to pass legislation implementing United Nations conventions we have signed and ratified without having something to provoke the passing of legislation?

The Chairman: You might go so far as to say they ought to do so.

Senator Lang: Perhaps I could elucidate. I think the witness made it clear to us that this has nothing to do with the convention. Our obligations under the convention are already satisfied by our code. I think we have been misled by previous witnesses on this.

Mr. MacGuigan: Except that I added I thought it was in the spirit of the convention.

Senator Lang: In the spirit of it but in fact it is not an obligation imposed by the fact of our being a signatory to the convention.

Mr. MacGuigan: That is my understanding.

Senator Croll: Further to the question why the committee was appointed, if you turn to page 11 of the Cohen Report and continue on to at least page 25, the reasons why the committee was established are given; they are ample reasons and very specific.

Mr. MacGuigan: At least they give the reasons why it could have been established. I do not want to get into a discussion of the reasons or motives for appointing the committee. There are a lot of factual reasons. I

do not know whether they were sound reasons or not; presumably they were.

There are two or three smallish things I would like to add. Since the Canadian Labour Congress have done me the honour of reading some of my views on this section into the record already I do not think I need repeat them. I should like to comment on one or two rather smallish things.

In the two exculpatory clauses, paragraph (a) is original. Paragraph (b) is merely taken from the phrase used with regard to criminal defamation. The defences allowed by the code for criminal defamation are in that part of the code beginning with section 247. We take that phrase from the law of criminal defamation. Personally I am not very happy with that law. I think it could be cleaned up, but since it has existed for many centuries in the common law perhaps it had better await a general revision of the Criminal Code.

The part that concerns me especially is the clause "the public discussion of which was for the public benefit". I am not sure that should be a consideration. The important part is "on reasonable grounds it is believed to be true", so we have not only the breathing space allowed by the truth itself, but a surrounding ambit of doubt where a reasonable man could believe the things were said to be true even if in fact they could be shown were not.

The Chairman: Would you advise we strike out "the public discussion of which was for the public benefit"?

Senator Lang: I would suggest that that section is the crux of the precedent.

Mr. MacGuigan: That would be my fear and I have not done all the research on that phrase which would allow me to make an enthusiastic recommendation, but it would certainly be my inclination to do that. I think the only other thing that I wanted to comment on was the onus which the two exculpatory clauses put on the defendant. He must establish that the statements communicated were true or on reasonable grounds or he believed them to be true. I do not think that the committee felt with any great fervor that it was desirable to put this burden on the defendant. The burden could just as easily be on the other side, but it did seem to us that on balance it is better to put the onus on the defendant. After all these are facts peculiarly within his knowledge and he believes them to be true on reasonable grounds. It has to do with his state of mind and certainly he is

much more acquainted with it than the Government would be. Also with regard to some of the statements which are made and which are perfectly outrageous and to which there is no shadow of authenticity, it would hardly be fitting to require proof of falsehood unless the defence raised the question. For example, it is a well established fact that the protocols of the Elders of Zion are a forgery. If this is to be brought up by any court it should be brought up by the defendant in an attempt to prove they are genuine.

Senator Lang: The courts can take judicial notice can they not?

Mr. MacGuigan: They might in that case, although it is not a fact of which there is common knowledge. There are many people who know it, but it is not quite like the things of which the court most usually takes judicial notice.

Senator Walker: The shift is the onus to the prisoner or accused; a dangerous precedent.

Mr. MacGuigan: It is done of course in other sections.

The Chairman: It is criminal libel.

Mr. MacGuigan: Yes, I think it is.

The Chairman: The judge rules that the article is capable of a libelous meaning and the onus is then on the defence.

Mr. MacGuigan: By section 261 of the code the onus is put on the person who tries to make truth a defence.

The Chairman: That is very ancient, 200 or 300 years old.

Senator Prowse: Would not the principle be to the effect here that a man is making a statement where he says I believe this to be true and am putting it out as true. I do not hold it unreasonable under those circumstances to say, all right, but show us where it is true if you can.

Mr. MacGuigan: I do not myself believe it is unreasonable. I support it as it is written here. But I have participated in many public meetings with other civil libertarians in which this point arose. I do not think it would destroy the effectiveness of the legislation if it were changed. Personally, I think it is much better the way it is.

I believe, Mr. Chairman, that covers the matters I wanted to bring to your attention in

answer to your kind invitation. I certainly will be pleased to discuss any further matters you want to bring up. I have no further comments to make on my own.

The Chairman: Senator Lang has a point.

Senator Lang: I would like to go back again, if I may. In relation to the amendments to the Criminal Code now being considered in the other place and the general principle in connection with the homosexual provisions where we are getting the nation out of the bedrooms of the state or of the citizens, in this section 2 we are putting the state right back in the living rooms of the citizens by applying the law not only to statements communicated in a public place, but statements communicated in any place. This I believe is an extension of the law as it exists in England which protects communications made in private or amongst associations or people that have some common interest in a subject. It seems to me here that not only we are adopting a principle contrary to that, behind the revisions to the code, but one that is an extension of the English legislation.

The Chairman: The defence, you know, may always be privilege, and that brings in what you are speaking about.

Senator Lang: Or maybe consent.

Mr. MacGuigan: I am checking the English legislation.

Senator Lang: In the homosexual section, Mr. Chairman.

Mr. MacGuigan: I am checking the English Race Relations Act. I believe it may not support the suggestion. It is generally restricted to what happens in public, although I think that section 6(1)(a) of the British Race Relations Act would go further than that. If I may just read it, it says:

A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain, distinguished by colour, race or ethnic or national origin, he publishes or distributes written matter which is threatening, abusive or insulting.

The word "publishes" in the traditional common law meaning includes any kind of communication. It is not restricted to written matter, and I think this word "publishes" would include any kind of distribution. The

section refers to written matter; it obviously does not refer to conversation, but I think it could certainly refer to something which a person had written and had handed to another in his own house.

Of course, there might be problems of proof in such a case, but I think that it would be considered to be publishing written matter to write or to type something and give it to someone who is not in a public place. I think this would be prohibited by the English legislation.

Senator Lang: We had a witness before us from the Justice Department and my note and my recollection is not exactly clear about it.

Mr. MacGuigan: Perhaps my opinion is different from his on this matter. I did read his testimony over and I did not catch that point. I would assume that this is probably a debatable legal point. In fact, we would have to have an opinion of an English legal expert on this, to give us something more decisive.

I am losing the general tenor of your question, senator.

Senator Lang: What I am coming at is, in a philosophical way, whether this act is sound in extending group libel from that which is communicated in a public place to that which is communicated in a private place.

The Chairman: Is that true, is that the fact? You are doing that? Let me ask you this question.

Can you tell us whether the usual defences of privilege would apply to these provisions, if we put them in the Criminal Code?

There are certain privileges in the libel act, but they are nearly all newspaper libels. But there are common law privileges, privileges between husband and wife, privileges between employee and employer, privileges for communications, justifiable communications, for specific purposes or under specific conditions.

There are quite a number of them. I have not got them all in my mind. They are applicable in a libel action, a criminal libel action as well as a civil libel action. Would they apply to this section? Do you know that? Can you answer that?

Mr. MacGuigan: Well, my opinion would be that they would not apply here; that they are maintained in the Criminal Code with regard

to defamatory libel respecting an individual in sections 247 and following of the Code; that they do apply to that area but that they would not apply here. They would be negated by this the way it is written. We did not take them into account. Our assumption was that they did not apply.

Senator Lang: Mr. Chairman, I note here for the record that the words "in any public place" which qualify the offence under section 267B(1) do not appear in subsection (2).

The Chairman: That is true. Therefore the libel may be at any place so far as subsection (2) is concerned.

Senator Prowse: A person may rap on your door and when you tell him to come in he may then start in. Or he may come round with a printed statement and leave it in your mail box or he may simply shove it under the door or just drop it in your yard or out in the street. We cannot let legislation go if there are not safeguards in it, but it seems to me with respect to the wilfulness and the whole tone of subsection (1) that it is intended to take care of a person trying to incite a crowd in a public place, where there is likely to be a breach of the peace. In the second part I think we are getting down to a case where we are dealing with people distributing hate literature. Perhaps it is not specific enough, but I think that is what it gets at.

Senator Lang: It is group defamation.

Senator Prowse: This would be the type of thing, but I do not think it is intended to cut in on private conversation between people. If it goes that far, perhaps it goes too far.

Mr. MacGuigan: I would like to answer Senator Lang's point in a philosophical way, since he has put it to me in those terms. He has also put it in the context of the distinction between public and private morality, which is running through many of the new proposals to reform the Criminal Code, although, as I suggested in my speech in the House of Commons, if we took this as our principle, we would have to revise much more of the Code than we have done up to this point. I do not think something is a matter of private morality merely because it occurs in a house involving only two people. I suppose, on the other hand, it is probably a matter of public morality if it occurs on the street. That is the simpler case. But everything that occurs in a private place and has

the appearance of being a private conversation. . .

Senator Lang: They might be consenting haters.

Mr. MacGuigan: I think there are many things which occur in a private context which could be considered to be matters of such public interest that they would simply be matters of public morality. I mentioned earlier the case of the father's behaviour towards his children and his family duty to support them, and we have that written into the Code. He has to supply them with necessities. On the face of it, these things might seem to be matters of private morality, but they are not private morality.

I would argue that what takes this out of the category of private morality is the reference to the social group. Even if only two people are involved, this is not just a conversation in which only these two people are affected, because it involves the interests of a whole group. Now, this is a difficult concept because libel itself is difficult to justify and slander is even more difficult since it is an immaterial thing. If I, in my house, libel Mr. X, if I am talking to Tom Jones and I libel Mr. X, this is a circumstance in which, conceivably, I could be convicted of criminal defamation, depending on what I said, and I might also be open to a civil action.

This is a difficult area to discuss because of the fact that the injury is so intangible. I might argue by analogy that to injury to an individual in such circumstances, even though he is not there and it is between two people in comparatively private circumstances, there is just as much injury to the group, when the discussion involves a group, rather than an individual.

Senator Choquette: But we have this defence available to an accused now; he may show the truth of his statement. Now surely we cannot say that the truth of the statement will justify the wilful promotion of hatred.

Mr. MacGuigan: We do.

Senator Choquette: We do in this section, but would you say that the public interest ever justifies the willful promotion of hatred? This is a dangerous act because we have these defences to it. You may have a man who will say "I am going to look into the truth of the matter; I'm going to study every statement I make or publish in writing" and while he is in fact promoting hatred, he can

go to court and show the truth of his statements. As I say, this is a dangerous act, because you are making such a defence available to an accused who has wilfully promoted hatred.

Mr. MacGuigan: I think, senator, it depends on one's scale of personal values, I put truth very high in my personal scale. Therefore I would say that if what a man has uttered is actually true, even if it has the effect of creating hatred, this should be a valid defence to a criminal action. As far as the individual is concerned I would not take away the fact that the individual who has been libelled has certain rights in civil actions. But it seems to me that if the matter is true, a criminal court ought not to convict. I would take the same attitude with regard to group defamation. If the statements made about the group can be documented historically or scientifically, while it may lead to a certain amount of discord at the time, it should not be prevented from being said. An interesting case in point is that of Daniel Patrick Moynihan in the United States who has been subjected to a great deal of criticism by negroes because he has written an adverse description of negro family life. So far as I am aware what he has written is true, and has been adequately documented to show its truth. His study is of great social interest, and I would say that that aspect of it is more important than the aspect of promoting hatred. In the long run the only thing that can create lasting hatred is something that is false.

Senator Croll: There is no qualification on truth. A thing is either true or it is not true.

Mr. MacGuigan: Yes.

Senator Croll: So where is the problem?

Mr. MacGuigan: As I understand it the senator is suggesting that by allowing such a defence we are opening the flood gates to hatred because people will be saying true things about other people that will stir up hatred.

Senator Lang: In civil law malice wipes out the defence of truth of their comment. If you follow that reasoning you would have to look at the defence of truth which could be wiped out by proving malice.

Mr. MacGuigan: That is right. By dealing with all these things you could get a very complicated piece of legislation.

Senator Prowse: But does not the fact that it is wilful constitute the criminal element, and the necessity for proving intent within the framework of the law places a burden on the Crown, and that would take these matters out of the ordinary kind of conversation. It would seem to me that this would have the same effect as showing something is malicious in civil libel.

Senator Lang: In other words, you could prove you were drunk and did not really mean it.

Senator Prowse: As a matter of fact, that is good for murder even, in case anybody is interested.

The Chairman: Well, gentlemen, are we pretty well through? If we are, I want to say thank you to you, Mr. MacGuigan, for a very fine presentation. You have given it a great deal of thought, and you have certainly helped us in our work.

Mr. MacGuigan: Thank you, senator; I enjoyed it.

The Chairman: So have we enjoyed it.

The committee adjourned.



First Session—Twenty-eighth Parliament

1968-69

THE SENATE OF CANADA
PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 6

Sixth Proceedings on Bill S-21,

intituled:

"An Act to amend the Criminal Code".

TUESDAY, MARCH 25th, 1969

WITNESSES:

1. Reverend Richard D. Jones, President, Canadian Council of Christians and Jews;
2. Association of Survivors of Nazi Oppression: Mr. Paul Goldstein, National President, and Mrs. S. Citron, Chairman, Toronto Division.

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Giguère	*Martin
Aseltine	Gouin	McElman
Bélisle	Grosart	Méthot
Choquette	Haig	Phillips (<i>Rigaud</i>)
Connolly (<i>Ottawa</i> <i>West</i>)	Hayden	Prowse
Cook	Hollett	Roebuck
Croll	Lamontagne	Thompson
Eudes	Lang	Urquhart
Everett	Langlois	Walker
Fergusson	Macdonald (<i>Cape</i> <i>Breton</i>)	White
*Flynn		Willis

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,
With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—

Resolved in the affirmative."

Extracts from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimbursement as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extracts from the Minutes of the Proceedings of the Senate, Tuesday,
March 11th, 1969:

“With leave of the Senate,

The Honourable Senator Langlois moved, seconded by the Honour-
able Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs
be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, March 25th, 1969.

Pursuant to adjournment and notice, the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Bélisle, Choquette, Cook, Croil, Eudes, Fergusson, Haig, Hollett, Lang, Macdonald (*Cape Breton*), Prowse, Urquhart and Willis.

The following witnesses were heard:

1. Reverend Richard D. Jones, President, Canadian Council of Christians and Jews;
2. Association of Survivors of Nazi Oppression: Mr. Paul Goldstein, National President, and Mrs. S. Citron, Chairman, Toronto Division.

At 4 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

L. J. M. Boudreault,
Clerk of the Committee.

THE SENATE

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Tuesday, March 25, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck (Chairman) in the Chair.

The Chairman: Honourable senators, I have a number of things I wish to bring to your attention before we commence hearing evidence. For instance, I have a letter from Mr. Andras, Director of the Legislation Department of the Canadian Labour Congress. I wish to put this on the record:

You will no doubt recall that when the Canadian Labour Congress appeared before you in connection with Bill S-21, you questioned us about 267A in its present form, with particular reference to the lack of any definition of "any group". You asked whether the Congress would give favourable consideration to the insertion of a definition into Section 267A which would define a group as one which is identifiable (if I remember correctly), on the basis of colour, race, religion or national origin. Our reply at the time was that we felt such a proposal was sound but that we would wish to consider it more carefully afterward. We have since done so and I am able to inform you that we would still support such a proposal. I presume you will convey this information to your committee.

I also have a letter from Mr. Carl Mollins, who was the reporter who made the mistake in text and blamed Senator Hollett for something that had been misunderstood by somebody else. He writes me an apology and says:

I learned today that I committed a serious error of identification this week in attributing remarks wrongly to Sena-

tor Hollett in a report on the Committee on Legal and Constitutional Affairs.

I have apologized to Senator Hollett and, because you are chairman of the committee, I wanted you to know how much I regret my lapse, especially because of the embarrassment caused Senator Hollett.

He says, "I feel very badly about this episode," and he signs "Carl Mollins."

An Hon. Senator: Is that *The Citizen*, sir?

The Chairman: "The Parliamentary Press Gallery" is the heading of the letter. He does not say Canadian Press and he mentions no newspaper, but it was of course the Canadian Press and in that way got into many newspapers.

I have a letter which perhaps I should call your attention to, received from James William MacLellan, Associate Editor of *The Paper*—*The Paper* is underlined—Sir George Williams University, in which he is strongly opposing the passage of Bill S-21.

He says:

I beg of you to oppose this bill in the name of freedom and democracy.

Senator Haig: Who is that signed by, Mr. Chairman?

The Chairman: MacLellan is his name.

Senator Haig: Who does he represent?

The Chairman: He describes himself this way: James William MacLellan, Associate Editor, *The Paper*, Sir George Williams University.

Senator Prowse: It is obviously personal.

The Chairman: It is obviously personal. I do not know if I should call it to the attention of the committee, but I have done so. Senator Lang will recall that he asked me for an opinion from the Department of Justice. I

have taken care of that to some extent and I have this memorandum:

Mrs. Jones, secretary of Mr. Scollin, of the Justice Department, called to say that Mr. Maxwell—

The deputy minister to whom I wrote asking for the information—

the deputy minister, has referred your letter re the Bell Telephone Company to Mr. Scollin. In your letter you asked for information regarding the legal right, power and authority of the Bell Telephone Company with respect to the use made of its private lines.

Senator Lang asked for this information.

Mr. Scollin wishes to discuss this request with others in his department and will be unable to provide you with the information in time for your meeting tomorrow, March 25.

I told Mrs. Jones that we expected to resume our hearings on April 15 and she assured me that Mr. Maxwell would have the information ready prior to that date. I have not only described what Senator Lang wanted, but I sent the transcript covering the request, and the discussion that went with it.

I understand Senator Prowse has something to put before us.

Senator Prowse: Honourable senators, I received a letter from Mrs. Ostapchuk, who is the executive director of the Vancouver Civic Unity Association. Copies of the letter have been circularized to members of the committee, as agreed.

The Chairman: My thought is that we should read this particular paragraph or page because it has such wide significance.

Senator Croll: Oh, no, Mr. Chairman, I oppose putting it on the record.

The Chairman: Have you seen it?

Senator Croll: I have. You sent it to everybody. I got it in the mail. The ravings of some maniac must not be put upon our record. Any man who has read it would not think that the man is in his right mind who talks in that fashion about everyone. I do not think we ought to provide him with a record, surely.

The Chairman: You have all read it?

Senator Croll: People later on will quote and say "I was quoting from *Hansard*," if we have this sort of thing.

Senator Prowse: May I say that if it were circulated to the committee it would show that this type of thing is going on right now and that it is directed to a group that might not be as discriminating in their reading.

I do not feel it would serve any great purpose to put it in the record. I am concerned about putting such things in the record because of such possible use of the record by other people. So long as it is in the hands of the committee, it has served the purpose it was intended to serve, in other words, it is information before us. It is something which each member can look at when he is making up his individual mind. I certainly would not wish to have my name on the record associated with putting this thing on the record.

The Chairman: Is that the general feeling or consensus of the committee?

Senator Haig: If it is not going to be put on the record, why was it sent to all of us?

The Chairman: There is no question about it, you have all to read this. It is much too important to disregard.

Senator Prowse: The letter was addressed to me, from that angle, from last year, in that they assumed that I was the chairman of the committee now, which I am not. I sent it on to the committee and I suggested that it at least be circulated to the members of the committee. The chairman concurred in that. Whether the committee wants it on the record now is its own affair. My feeling is that if it is in the hands of the members it is something that will help all of us to make up our minds when we come to the final decision. But I am a little bit concerned about putting things like this into the record, because I have seen too many instances of people taking an official publication and saying, "Look, this appeared in *Hansard*, or in some official Government record.

Hansard is available to everyone, and not everybody is as discriminating as we have been owing to the experience we have had.

Senator Haig: Mr. Chairman, I withdraw my objection.

The Chairman: Very well. It will not go in the record. The fact is that Mrs. Emily Ostapchuk, Executive Director of the Van-

couver Civic Unity Association, sends the copy to Senator Prowse. I might also add that Mr. B. G. Keyfetz, of the Canadian Jewish Congress, has also sent a copy of the document to me. I understand that Senator Prowse knows this Mrs. Ostapehuk.

Senator Prowse: No, I do not know her, sir. But before sending this on to you, I took a look at the people on the letterhead and on there I noticed Honourable George Pearkes, a patron, Senator Norman MacKenzie, the honorary Chairman, and then on down a list of people who seemed to me substantial enough that we could assume this was a responsible organization.

The Chairman: Mr. Pearkes is a patron and our former Senator MacKenzie is the honorary Chairman. And, as you say, there are quite a large number of no doubt distinguished people in the marginal list.

Now, honourable senators, we have two groups of witnesses to hear today.

Senator Choquette: Mr. Chairman, before you call on any witnesses, may I clear up a point in this committee? You will recall that the first witness we heard last week expressed himself in French. His name was Gerard Rancourt. At that time I pointed out to the committee that of the 17 or 18 senators present only about five could follow Mr. Rancourt in French. I suggested to him that if he had an English version of his speech he should distribute that to all senators. That was done after my suggestion. Then I even went further to co-operate with the witness by suggesting that, if room 356 upstairs, the one above this one, was not occupied at the time, we could probably avail ourselves of the simultaneous translation system in it. But it ended there.

Now, I wish to point out a piece of irresponsible reporting. The French paper *La Presse*, which is the most circulated French newspaper in Canada, has published an article—which, I might say, was brought to my attention only yesterday together with letters of protest against me. The article reads: "Senator Choquette criticizes Gerard Rancourt who is expressing himself in French," and the article and these letters that I have received now are to the effect that there is no longer any need of French Canadians to be elected to the Senate. Therefore, I would like something from the Chairman to say that my motive was not what this newspaper article claims.

The Chairman: Not only your motive was not, but your action was not. I was purely a matter of procedure so that everyone would understand what the witness had to say. While we have a simultaneous translation equipment in the committee room upstairs, we had no one at that moment able to perform the task, and so we had to proceed as we did. The witness spoke in French, to which you had no objection whatsoever, nor indeed, had any of us. As I pointed out, a witness has a right to speak in French before a committee of the senate at any time if he so desires. However, as I said, he spoke in French and we had an English copy of what he said so that those who could not speak French could at least understand what was being said. It was, as I say, a purely mechanical procedure which was dealt with effectively, as you had suggested. You did not criticize a witness for speaking in French; your motive was that his message be understood. I support entirely what you say now, Senator Choquette.

Honourable senators, we have two groups coming to help us today. One is the Association of Survivors of Nazi Oppression and the other is a representative of The Canadian Council of Christians and Jews. The Council is represented by its president, the Reverend Richard D. Jones, and Mr. Jones assures me that his memorandum is short. I discussed the matter with the other delegates and it seems reasonable that we should ask him to speak to us first.

I might add that Reverend Mr. Jones is not only the president of The Canadian Council of Christians and Jews but he is the organizer of it, the power behind the throne, shall I say. He is the energy that has developed that organization into a very large and important element in our society. I heard him very recently when we were organizing a council of that body for the city of Ottawa when he made a most interesting, informative and very spirited speech. I therefore I have very much pleasure in introducing to honourable senators the Reverend Richard D. Jones, President of the Canadian Council of Christians and Jews.

Reverend Richard D. Jones, President, Canadian Council of Christians and Jews: Honourable senators, my brief is a very brief brief, and I would like with your permission to take just a minute to mention why I have asked to be allowed to speak to you. I am not an authority on the law, of course, and I am

not even a trained sociologist or psychologist. But for the last 21 years, 15 of them as a Canadian citizen, I have given all of my time to work in the field of group relations throughout this country, and my only reason for asking to come is the fact that after this long experience I feel I have had a fairly close relationship with this field in our country.

The Chairman: And you might add to that that you are invited to be here.

Mr. Jones: Thank you very much, sir.

Honourable senators, the Canadian Council of Christians and Jews is a civic organization of religiously motivated persons seeking through educational means to eliminate tensions arising out of religious, ethnic, racial or cultural differences. While its members are drawn from the major religious groups, they function as individuals and not as official representatives.

Its by-laws state:

the purpose of the Canadian Council of Christians and Jews is to promote justice, amity, understanding and co-operation among the many racial, religious, ethnic and culture groups in our country, and to analyze, moderate and finally eliminate intergroup prejudices which disfigure and distort religious, business, social and political relations, with a view to the establishment of a social order in which the religious ideals of brotherhood and justice shall become the standards of human relations.

The Canadian Council of Christians and Jews was organized in 1947 with a budget of \$15,000 and a staff of one person—I was it! Today, it operates on a budget of almost \$400,000, with a staff of 20 working out of offices in Vancouver, Calgary, Winnipeg, Toronto, Montreal and Halifax.

The Chairman: And what about Ottawa?

Mr. Jones: We do not have a professional here, but from each of our regional offices we have a number of chapters that are responsible to that particular regional office, so I would say there are probably 40 chapters of the organization throughout the country.

The Chairman: And none of those is in this city?

Mr. Jones: One was formed just on Thursday in this city.

You have received many briefs, regarding Bill S-5 and now Bill S-21, by lawyers, members of the judiciary. However, this brief has been prepared and is being presented to you by one who has spent over 20 years working full time in the field of intergroup relations. It was prepared at the request of the national executive committee of the Canadian Council of Christians and Jews.

Bill S-21 should be enacted into law because: there are certain individuals in our society that only the law can keep from spreading a doctrine of hate through the distribution of literature, through public addresses, through the use of the telephone. I quote from a letter received some time ago, giving a post office box number in Scarborough, Ontario.

A mutual friend informed us you are a dedicated opponent of Jewish communism.

He is half right—the communism part!

Drop us a line and an organizer will visit you to explain our activity here in Toronto. We are mailing out thousands of cards and leaflets to obtain mass membership. You will be asked to vote for anti-Jewish candidates, boycott Jewish goods, etc.

You will note his spelling has not been too good.

We believe in the superiority of the Aryan race as proved by his great culture and civilization. The negro races have never developed a civilization, discovered any new invention, written a great symphony or even originated an alphabet. They are on a much lower level than the whites. We believe in sending all negroes back to Africa whence they came.

On the Jewish question our policy is much stricter. We demand the arrest of all Jews involved in communist plots or zionist plots, public trials and executions. All other Jews should be immediately sterilized so that they could not breed more Jews. This is vital because the Jews are criminals as a race, who have been active in anti Christian plots throughout their entire history.

In the week of March 10 of this year you could dial a phone number in Toronto and listen to a recorded message concerning "Jew-lovers", "Jew-lawyers", "JewRonto". The message ends with an invitation to Allan Gardens on April 20, 1969 "to honour the birthday of the greatest man ever born on

this planet, Adolf Hitler, Jews beware—our tongue is sharp.”

The files of the Canadian Council of Christians and Jews contain many samples of hate literature and letters from people who have received it. The circulation of such literature serves to feed a small group of bigots who nourish their hate on it; more important this literature hurts the innocent whom it attacks whether it be aimed at Jews, Indians, Negroes, or members of an ethnic or religious group. It also encourages those with no firm convictions about justice and fair play, who feel they have been mistreated by our society, to look for a scapegoat.

There may be a feeling among some that while there has been distribution of hate literature, while there are a few individuals who preach a gospel of hate, there is no cause for concern. Let us keep in mind that in periods of economic depression, and pronounced political unrest, the dissemination of hate propaganda has a tendency to increase. International situations may well create and intensify hatred of groups in our own country.

The law will act to restrain those who would promote hatred and it would help to give a feeling of security to those who have suffered from hate pedlars while living elsewhere or even here in Canada.

Bill S-21, if enacted into law would restrain the pedlar of hate and it would give legal grounds to a corporation such as Bell Telephone Company or other concerned parties on which to act. Such legislation would protect us from the tirades of cranks and racists who seek to disunite the nation. It would put our country on record as saying it is wrong to wilfully disseminate hatred in our nation. Unless action in law is taken it appears we are not concerned and sanction the behaviour of those who spread hatred. Such legislation would let the people of this nation and every other nation know where Canada stands.

Bill S-21 would assist the Canadian Council of Christians and Jews in its educational program—an educational program which has prepared many people of this nation to endorse and obey legislation to outlaw genocide and hate-mongering. No law can be effective unless it is accepted by the great majority of our people. I firmly believe that the Canadian Council of Christians and Jews in its twenty years of promoting educational programs, in the field of intergroup relations,

has made discrimination and the prejudice on which it feeds unpopular in this country.

We have pointed out to hundreds of thousands of our fellow Canadians through public addresses, seminars, and summer courses in universities that discrimination is economically costly, that it is an evil according to the teachings of the world's great religions, that it is against the principles of a democratic government, and that it harms those against whom it is directed, and also those who practise it.

We have opened the channels of communication between those who differ in race, colour, creed, and ethnic origin, and have tried to break down the “glass curtain” that exists in our country—a curtain through which we can see each other, but one that prevents us from coming to know each other. We have made it possible for thousands of high school students from nine provinces of Canada—students who were Negro, Indian, Catholic, Protestant, Jewish, Hindu or Moslem, and of many ethnic backgrounds—to exchange visits of one-month duration with French-speaking, Catholic students from the Province of Quebec. We have promoted Christian-Jewish dialogues, ecumenical gatherings of clergymen, seminars of industrialists and labour leaders on “Equal Opportunity for All Canadians”. We have encouraged bilingualism.

Through these efforts many Canadians have been prepared to accept and abide by Bill S-21, if enacted by the Government of Canada into law. We of the Canadian Council of Christians and Jews will be surprised and, may I say, tremendously disappointed if more than a handful of people ever come to trial for breaking such a law.

However, it will be effective for us to be able to say, not only are the great majority of Canadians, the teachings of the world's religions, but the law itself is on our side. Thus we endorse Bill S-21 that prohibits the advocacy of genocide, the incitement of hatred in public places likely to lead to a breach of peace, and the wilful promotion of hatred and contempt against any identifiable group.

The experience in Europe before and during World War II stands as a lesson to us. We must always be alert to the promotion of hatred. We must ever defend the sanctity of the human personality. And we urge you, honourable senators, to make every effort to enact Bill S-21 into law.

The Chairman: Are there any questions you would like to ask the Reverend Jones?

Mr. Jones: I might add that I will be seeing Mrs. Emily Ostapchuk tomorrow. I will be speaking in Vancouver tomorrow. She is one of the people who will be at the meeting where I will be speaking.

The Chairman: You have told us about the growth of your organization from one with a very small budget to one of \$400,000. Could you give us some idea of your membership?

Mr. Jones: We have approximately 10,000 members across the country. That is, people who make a contribution to the organization. I would say about 10,000.

Senator Belisle: Is there such a thing as an annual fee to belong to the organization.

Mr. Jones: Not a definite annual fee, such as \$2, \$5 or \$10. There is no definite stated annual fee. The largest donation I have ever received is \$5,000. Then again, on one occasion in Toronto when speaking to students, in a part of Toronto with a great cross-section of population, the students passed round the hat and picked up \$5. I think that is the most sacred money I ever received.

Senator Belisle: I think the organization has done a very good job.

Senator Croll: Some of the committee may know what you are doing, but I wonder if you would take a few minutes to describe some of the work in which you are engaged, particularly inter-group work amongst students in various parts of the country. I think that has something to be said for it.

Mr. Jones: About 13 years ago we started with an exchange of 10 students from Toronto with 10 students from Montreal. Last year we moved 3,000 from the nine provinces of Canada, 1,500 into the Province of Quebec. Each student was matched with a French-Canadian student of similar age, hobbies, background and interests. The exchange was for four weeks plus travel time. We chartered a number of trains last summer to move these students and it was a very exciting project. For instance, we had a special train going from Toronto to Montreal and picking up students along the way; a special train from Vancouver which picked up all the way across the country; we had another train from Halifax; from Newfoundland we ran, not a train—not the *Bullet*—but a special plane into Quebec City. We moved 3,000 students.

It is interesting to see how aloof they are at first. I introduce them to one another, saying "Richard Jones, meet Rocket Richard", and the two boys will shake hands, look stupid and go away. I would introduce two girls, Marie-Anne Duchênes to Nancy Jones and the two girls would put their arms around each other and look stupider and go away. You would see them a month later and the change would be fantastic. It is a real thrill to watch what happens to these young people.

The first Protestant teacher in the College of Ste. Anne de la Pocatière was a boy that had gotten through this exchange and taught history at the College Ste. Anne in French. This was a boy raised in Cooksville, Ontario. I could name dozens of teachers in Ontario who got their interest in French through the exchange and improved their French, and so on. I feel it is a marvellous project. Thank you, senator.

The Chairman: If there are no more questions, I want to say this to you, Reverend Mr. Jones. We are grateful to you for having come here and we appreciate highly the memorandum you have read. It was given as a public service for which we all thank you and I am sure all the members of my committee join in what I have said.

Mr. Jones: Thank you very much, sir.

The Chairman: Will Mr. Goldstein and Mrs. Citron come forward. Honourable senators, ladies and gentlemen, our next group of witnesses represent the Association of Survivors of Nazi Oppression. They will be represented by Mr. Paul Goldstein, the National President, and by Mrs. S. Citron, the Chairman of the Toronto Division. I cannot tell you a great deal about the association, but our first witness will be Mr. Goldstein, and I understand he will do so.

Mr. Paul Goldstein, National President for the Association of Survivors of Nazi Oppression: Thank you, Mr. Chairman. May I first introduce some of the other delegates present here and members of our association.

We have Mr. Schweitzer on the left, Mr. Krasuski from Toronto, Mrs. Placzek, who is the President of the Women's Division of the association from Montreal, Mrs. Laks, Treasurer of the Women's Division from Montreal, my wife, Mrs. Goldstein, Mr. and Mrs. Airst from Toronto, Mr. I. Weisfeld, Vice President of the association, Mr. George Fine, the other Chairman of the association, and Mr. Paul

Orlan, who is a member of the Executive of the association and also of Montreal.

Mr. Goldstein: Mr. Chairman and honourable senators, I would like to say this in French:

[Translation]

It is impossible, in the time allowed me, to present the brief in both languages. However, it will be my pleasure, to answer in French to any questions that you will see fit to ask in that language.

[English]

Regarding the association, let me read from our publication "The Voice of Survivors" some excerpts from the constitution of our movement. This will give some idea of what we are about.

This is the 1966 edition and on the front page and centrefold are some illustrations of the commemoration of the liberation of Europe from Nazi oppression by the Canadian armed forces and other allied forces.

This historic liberation rally took place here on this Parliament Hill of this Parliament in the presence of Prime Minister Pearson and members of the cabinet, and of the armed forces.

As there were some honourable senators present, like Senator Connolly (Ottawa West), and Senator Coll, who, as a matter of fact, lit one of the torches in memory of the one million children who perished in the holocaust.

At that time there were 5,000 people gathered on Parliament Hill, including members of the association from Montreal, Toronto, Ottawa and from some places out west as well.

The purpose of the association is best described in our constitution. I need not read the preamble. The constitution says:

By the grace of God and in the democratic spirit of Canada, we shall:

1. Preserve the memory of the millions of Victims of Nazi terror.

2. Remember the members of the Armed Forces of the Free World who fought so courageously the Nazi Peril and gave their lives for our Liberty.

3. Keep alive the history of the Nazi Terror and the heroic Resistance that kept on fighting against it under all circumstances, so that it should never be forgotten for generations to come.

4. Alert the Public against Neo Nazi Activities in whatever form and by whatever name, and awaken the public opinion in view of the rising Neo Nazi movements in the world today in order to promote an overall understanding of the danger of Nazism, by keeping the Community well informed and aware.

6. Promote and participate in necessary representations to the appropriate Government bodies in regard to antisemitic outbreaks and the rise of Neo Nazi movements in Canada and elsewhere.

7. Fight for Legislation which will make it illegal for any Nazi or Nazi-like movement to exist in Canada and which will make it criminal in conformity with the Genocide Convention of the United Nations Organization, for anybody to foster ideas of race hatred and mass murder....

9. Apply all the necessary means to combat any Nazi-type manifestations in every rational way, in cooperation with all democratic institutions in Canada, who are aware of the danger, so that the enemies of democracy shall not destroy democracy through the use of Democratic privileges in Canada.

10. Develop the highest standards of citizenship in ourselves, by encouraging, carrying on and participating in activities of a national, patriotic cultural and humanitarian nature; in furtherance of the best interests of our Community and of our country, Canada.

The motto of our association is the word "Remember". "NEVER FORGOTTEN—NEVER AGAIN". Our slogan is, "HOMAGE TO THE DEAD WARNING TO THE LIVING".

In membership we have in the three cities and in other communities in Canada well over 5,000 members who are dues-paying members. We have a large number of sympathizing people who turn out at our mass events. The qualifications for membership are as follows, and I quote:

Any person, Male or Female, 18 years of age or over at the time of his application, who is of good moral character, and who is himself a Survivor of Nazi Oppression, whether Former Inmate of one or more Nazi Concentration Camps or Ghettos, or Nazi Labour Camps, or a former Underground Fighter or Partisan, who took part in fighting the Nazis dur-

ing World War II, or who was uprooted by the Nazi Oppression or forced to escape persecution by hiding or leaving his country of Origin at the time, or a person who can demonstrate the willingness to support our activity and whose spirit, ideals and actions are in harmony with the aims and objectives of this Association as expressed in the Preamble of this Constitution and in the spirit of the Venerable Traditions of a Democratic Canada.

Article I states:

The non political character of this Association shall be strictly maintained as long as this Association is in existence. No direct or indirect political affiliation with any political party or movement, and no political activity shall be ever allowed.

This condition of non political alignment is the basic condition of existence of this Association, and shall never be amended, altered or repealed directly or indirectly at any time.

This, in a nutshell, is the basis of our association, Mr. Chairman. Any elaboration you wish me to make, based on questions, I shall be glad to do. Does this suffice, in your opinion, Mr. Chairman?

The Chairman: I think so. Thank you.

Mr. Goldstein: Now, Mr. Chairman and honourable senators, as to the matter under consideration, having followed the proceedings of this committee very closely, we wish to express our appreciation for the seriousness, sincerity, and thoroughness with which the members of this committee have tackled the complex matter before them.

We perhaps differ from the other witnesses who have appeared before this committee in that we represent a segment of the population which has lived through the kind of horrors which the proposed legislation intends to prevent.

However, since it is not our purpose to induce sentiment for your fellow citizens who have survived a nightmare of oppression and slaughter which can never be assessed in its true and full dimensions, we will refrain from baring to you the physical and mental scars which still mark every single survivor of the Nazi holocaust. Instead, it is our purpose, in being here, to redeem some constructive value from that maddening and frustrat-

ing toll of human lives, by offering for your consideration such conclusions from the darkest page in human history as may assist this committee in arriving at the most equitable solution possible.

We can easily spare the time and patience of all concerned by not belabouring the facts and evidence with which both you and we are by now already too familiar.

We are referring to the legislation similar to the one under discussion already in existence in a number of highly civilized countries such as Great Britain, Sweden, France, Norway, The Netherlands, Italy, the Federal German Republic, Denmark, Greece, Austria and India.

The Chairman: May I ask at this time what is your authority for this statement. Where did you find out, for example, that Great Britain, Sweden and France and so on have passed legislation similar to the legislation now before us?

Mr. Goldstein: At the time that Mr. Klein introduced Bill C-21, in order to provide the background material, I personally visited every consulate and, where necessary, the embassies of countries where we had read such material was available. I personally explained to the ambassador or the consul that we needed copies of the material. I might add that in many instances the consuls themselves were not aware that their countries had such legislation. However, they researched it and gave it to me and in fact I received exact copies which form a part of the background material for Mr. Milton Klein when he introduced the first bill in the series of bills we are familiar with.

The Chairman: Thank you. I am glad I asked that question.

Mr. Goldstein: We are also referring to the background material and contents of the United Nations Genocide Convention; to the Bills introduced in recent years in the House of Commons, especially the Klein-Walker Bill of February 20, 1964 and Mr. Nesbitt's Bill of June 16, 1965.

We are referring to the debates of the Foreign Affairs Committee of the House of Commons in 1964 and 1965, as well as to the material in the report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada.

There are, of course, a considerable number of important people in favour of the prin-

ciple of legislation to combat incitement to hatred. Those include, aside from those mentioned during the proceedings of this committee of Tuesday, February 25th 1969, and aside from the members of the special committee set up by the late Justice Minister Guy Favreau a significant number of prominent members of Parliament belonging to the different parties represented in the House, who have signified their affirmative stand in their replies to our inquiries

We have also noticed a two-fold development in the reactions of those who were, from the start, staunchly opposed to any form of group libel legislation.

On the one hand are those who, having taken the trouble of thoroughly investigating the various aspects of this complex issue, eventually did change their mind, and decided that such legislation is necessary, feasible and workable, without infringing on the vital tenets of our democratic system. Foremost in this category is our present Prime Minister the Honourable Pierre Elliott Trudeau.

On the other hand are those who still maintain that such legislation, however conceived, would be a threat to freedom of speech; while a smaller but not less vocal number hold, in addition, that there is no evidence in Canada of sufficient hate propaganda to warrant any such law.

On the issue of freedom of speech, every enlightened person is aware that there can be no unlimited freedom of speech in an orderly society. We already have laws against libel, slander, sedition, incitement to violence and so on. The question therefore is not, "Should freedom of speech be curtailed in a democratic society?" but, "Where does one draw the line?" Viewed in this light, the subject touches the very seams of the mosaic fabric which constitutes our multi-ethnic nation. For, this being a country of minorities, we cannot forget the dictum that, "The treatment of minorities is the barometer by which to measure the moral health of a society".

The four freedoms termed essential by President Franklin D. Roosevelt in a speech to Congress on January 6, 1941, were freedom of speech and expression, freedom of worship, freedom from want and freedom from fear and persecution. Now, if we accept these freedoms as essential to our way of life, it is evident that to exist side by side a proper balance has to be maintained. We hold that one freedom cannot be exercised at the

expense of another, that the moment one freedom infringes on another it has reached the point where it has to be held in check. For instance, no one puts into question the principle of freedom of worship, yet we would never allow, in its name, the practice of cannibalism or human sacrifice by a religious sect, for obviously such practice would violate freedom from fear and persecution on the part of those singled out for the offering. Similarly, the moment freedom of speech is abused to the extent of violating the freedom from fear and persecution on the part of any identifiable group as defined in the bill—subject to reconsideration of the term "religion"—the line has to be drawn.

Events in this century have shown that hate propaganda is a condition *sine qua non* for the preparation of a segment of the population for the persecution of minorities without hatred, and there can be no hatred on any organized level without planned incitement. The Nazi propaganda machine needed to operate on an intensive, permanent and mass scale to cast its target victims in an image which would permit rationalization of their extermination.

To allow identifiable groups in this country to be exposed to group libel and hate propaganda would amount to the gravest possible injustice and would cause the dislocation of the harmony between the various ethnic groups constituting our country. The lesson of history has taught the vulnerable minorities not to accept any such threats to their survival. However, there can be only one effective remedy available to any group threatened in a democratic society—the protection of the law. Should the legal system not afford such protection, the threatened group would be obliged to take matters in its own hands. When survival is at stake the choice is between legal recourse or violence.

Therefore, the existence of the law is no longer a matter of choice but of necessity; first, as a safeguard, second, as a most effective educational instrument. For no social injustice has ever been corrected without the benefit of appropriate laws, be it in the field of child labour or in the area of civil rights. In every instance, the outlawing of a social evil deprives it of the respectability and legitimacy which the absence of a prohibitive law affords it and gives law abiding citizens, who are in the vast majority, proper standards of right and wrong.

As far as the formula is concerned, there is no doubt in our minds that the legislators of

this country are just as capable as those of Great Britain, Sweden, the United Nations, et al, to formulate a law that would curtail the abuse of freedom of speech, without limiting its free expression. For that matter, we find Bill S-21, although desirable in principle, rather weak and ineffectual by the inclusion of such defences for the hatemonger as to render conviction highly unlikely, if not impossible.

There are at least three loopholes in the proposed bill. First, it has to be proved that the incitement to hatred is likely to lead to a breach of the peace so as to constitute an offence.

The Chairman: Now, wait a minute. Can we discuss the last statement before you go on? You say that there are at least three loopholes in the proposed bill, and that first it has to be proved that the incitement to hatred is likely to lead to a breach of the peace so as to constitute an offence. Does that not refer, witness, to section 267B (1), "Everyone who, by communicating statements in any public place, incites hatred or contempt against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of", and so on. Now, it is to that section you are speaking, is it not?

Mr. Goldstein: Yes.

The Chairman: But have you overlooked the second subsection of that section 267B? Subsection (2) says that everyone who, by communicating statements, wilfully promotes hatred or contempt against any identifiable group is guilty of, and it lists the offences.

You see, there is no likelihood of a breach of the peace provision there.

Mr. Goldstein: No. This is where we come to the other two loopholes, Mr. Chairman.

The Chairman: Well, go ahead, then.

Mr. Goldstein: Conversely, should a judge decide in a particular case that the public incitement of hatred was not likely to lead to a breach of the peace, the hatemonger would get off scot-free.

The Chairman: Would he in subsection (2)? There is no such provision in subsection (2).

Mr. Goldstein: Subsection (1) talks about a public place and subsection (2), of course, would overrule subsection (1), but our question is why is subsection (1) included?

Senator Prowse: You have two different things entirely. Subsection (1) and subsection (2) are completely different. The person could be charged under either of those two sections, and these documents, for example, that we referred to earlier today would be caught under subsection (2). Now, subsection (1) is intended to give the police the opportunity of stepping in and preventing a situation which appears to be becoming explosive from exploding.

Mr. Goldstein: Does it not appear from the report and the background material that there can be no present action by the police, that the thing can only be judged after the event?

Senator Prowse: This is not the same legislation as set out in the other bill. We have gone beyond what it recommends. This goes beyond the recommendations of the Cohen Report.

Mr. Goldstein: Who is going to decide if there is likely to be a breach of the peace?

Senator Prowse: Policemen on the spot.

Mr. Goldstein: Is this going to be a part of the bill?

Senator Croll: It is in the bill now.

Mr. Goldstein: So, if the policeman decides there is not going to be a breach of the peace, he can let the people continue.

Senator Prowse: If the situation is such that there is not going to be a breach of the peace he can let the man continue.

Mr. Goldstein: That is a loophole, then.

Senator Prowse: The moment he gives the statement, the policeman can arrest him on the basis of subsection (2), the communication of hatred.

Mr. Goldstein: In other words, the bill is just as effective without subsection (1).

Senator Prowse: No. Under subsection (2) you have to let him go ahead and blow up the place before you can arrest him. So the policeman has to make the judgment on the statement itself. But under subsection (1), where the situation is that the policeman thinks that an explosion is about to occur, then he can take the person away because it is likely to result in a breach of the peace. The policeman does not have to wait for the explosion to occur.

Mr. Goldstein: If he takes an affirmative stand, then there is no problem. But should he use the same leeway the other way, the thing can get out of hand.

Senator Prowse: How do we do this to give you the protection you want, then?

Mr. Goldstein: In all the laws in the other countries—for instance, may I just get out the Swedish law for a moment?

Senator Croll: What difference does it make what the law is in other countries? We are dealing with our own law here in the light of our experience, and we have had as much experience with law as has Sweden or almost any other country with the exception of Great Britain.

Mr. Goldstein: Well, to answer Senator Prowse's question, if a man incites to hatred, whether there is going to be a breach of the peace or not should not make a difference.

Senator Prowse: But you get him either way. You get him under subsection (2) if not under subsection (1).

Mr. Goldstein: If this is the case, then the objection is not valid.

The Chairman: I would think your objection is not valid, the way you have written it at least. You have not given sufficient thought to the fact that there are two enactments here, one where a person makes a statement in a public place likely to lead to a breach of the peace, in which case there are no defences, it not mattering whether it is true or untrue because he has interfered with the King's peace; the other one being where he publishes a libel that is not likely to lead to a breach of the peace but is a promotion of hatred, in which case he has the defences to which you have referred. So there may be two charges laid.

Mr. Goldstein: I will be the happiest person to find that the effectiveness of the bill will be such that the first clause will not be a loophole. I would be all for it in that case.

Senator Croll: The Government has presented this bill. The Government wants a bill. You have got ten or a dozen lawyers and other people here who know more than lawyers. This is not an exercise for us. The intention is to get a bill that works. So you give us that much credit and go on reading your brief, please.

Mr. Goldstein: Secondly, the promoter of hatred cannot be convicted where he establishes that his statements are true or, and this is the third escape clause, that their public discussion was for the public benefit and that on reasonable grounds he believed them to be true.

The Chairman: Now, let me add there that that is only the case where there is not a likely breach of the peace.

Senator Prowse: That is only a defence to subsection (2).

Mr. Goldstein: However, we do not wish to jeopardize the possibility of unanimity in favour of the principle of the bill by fostering dissent about its effectiveness. We would be quite satisfied to see Bill S-21 adopted in its present form and to let its efficacy be tested by the courts.

The other objection to which we wish to address ourselves holds that there is no evidence of enough hate propaganda to warrant legislation.

Obviously, there are some who have not yet been exposed to hate propaganda, nor seen any. It is easy to become smug about the danger when one was born into a majority group which never had to pay a blood tax for its existence. And what does it matter whether those in favour of the proposed legislation are Christian or Jewish, black or white? What does it matter, if the overwhelming majority of the legislators in Great Britain, France, Sweden, Norway, Denmark, The Netherlands, Italy, Greece, India, the Federal German Republic, where such laws already have been passed, are non-Jewish?

What does it matter, if on the Special Committee on Hate Propaganda, which unanimously recommended the passage of Bill S-21, Jewish members were in the minority also? What matters is whether the arguments advanced are valid or not.

Nevertheless, the objection that legislation is not needed, because there is not sufficient evidence of hate propaganda in Canada, is invalid on several other grounds as well.

First, the fact that someone has not seen any hate propaganda does not prove that it is not there or that it should not be eradicated. Would those among us who never witnessed a murder or handled marijuana take the stand that therefore murder or narcotics should not be outlawed?

However, and forgive me for introducing this personal note, as one who has been deeply involved during the last ten years in the combatting of hate propaganda and hate movements, and who has devoted a full year away from work and income to investigate the problem when it nearly got out of hand at the end of 1965, I can personally testify and show you that during that period hate propaganda in huge quantities and emanating from many quarters, was injected into our society. I am ready at your convenience to pass this material around and to elaborate on its origin and contents. Even had there been only a minimal quantity of such material circulated, the objection would still be invalid, for we are dealing here with a principle of public morality unaffected by quantity.

Once we accept and tolerate even one sample or incidence of evil we have already lost the battle, because from there on its growth becomes only a matter of degree and socio-economic circumstances, unpredictable and therefore beyond our control.

The activities of hate groups of both the extreme right and the extreme left in recent years in this country, conspicuously in evidence during the last federal elections, when our own Prime Minister was a target, and more recently on certain campuses indicate that the Canada of 1969 is not an isolated island in a world-sea of hatred and violence. Our generous immigration policies of the post-World War II era and the almost unbelievable innovations and accelerations in the communications field have brought in their wake the seeds of the despicable hate doctrines which had such ravaging results elsewhere.

We are dealing here with the greatest and most lethal communicable disease of the century. We do not wait for the better known physical contagious diseases to reach epidemic proportions before we immunize our populations against them. Similarly, we cannot allow the epidemic disease of race hatred, which has exacted a far greater toll in human lives than any other mass scourge in this century, even the slightest breeding chance.

While we have faith, honourable senators, that you will do justice to the form of the law, we plead that you will give equal weight to the demands of social realities and help secure the passage of the bill before you.

The Chairman: Thank you very much for that. Now, are there any questions, ladies and

gentlemen, that you wish to ask? If not, may I present Mrs. Citron. She is the chairman of the Toronto group, and this group, as I have already said, is the Association of the Survivors of Nazi Oppression. Mrs. Citron, would you come forward, please? May I introduce, ladies and gentlemen, the chairman of the Toronto group.

Mrs. S. Citron, Chairman, Toronto Group, Association of Survivors of Nazi Oppression: I really have nothing to add to what Mr. Goldstein has already said. I am in full agreement with everything in the brief, however, if there are any questions I would be happy to answer them.

The Chairman: Have you run into actual incidents of hate propaganda?

Mrs. Citron: Now, or in the past?

The Chairman: The more recent ones have been the more interesting ones, but if you have something to tell us along those lines we would be glad to hear it.

Senator Hollett: Excuse me, Mr. Chairman, if the witness would speak a little bit louder.

Mrs. Citron: I will try, thank you. Only in the recent years. I will not go into what has happened during the war. I am sure that most of you gentlemen and ladies are familiar with that and I certainly do not wish to drag that out. It has been pointed out recently by Reverend Mr. Jones that there were various forms of hatred that has been circulated and there was an invitation issued I believe for April 20 for Allen Gardens, where other such incidents took place during the past few years. We have had a Mr. Beattie up here in regard to hate propaganda. This is more or less the extent with which I have been lately exposed to hate propaganda. As Goebbels himself said, if a lie is repeated often enough, it will eventually be believed and this is basically the objection that we have.

The Chairman: Yes.

Mr. I. Weisfeld, Vice President, Association of Survivors of Nazi Oppression: I would like to help Mrs. Citron. In regard to the Bell Telephone incident in Toronto which occurred...

Senator Croll: We have heard the evidence on that.

The Chairman: Did you have any experience with the telephone broadcast?

Mrs. Citron: Well, the telephone number was made available to me, but of course for some strange reason I preferred not to listen to the message. I am sure I know the content without hearing it.

The Chairman: Well, thank you then, if that is the submission.

Mr. Goldstein: In order to elaborate on the answer about the evidence of hate propaganda, I had mentioned that I was prepared to show you the material that had entered our country and was published here as well. Since you raised the point, if I may, I would like to produce some of this.

Senator Croll: Mr. Goldstein, I do not think we raised the point, nor do not think we want to see it. We certainly do not want to see it on the record. We are not here to propagate propaganda. We are grown people and we know what goes on, and we know that it does exist and it exists in volumes. You add nothing to the cause by putting it on the record here.

Mr. Goldstein: With all respect, you did raise the question to Mrs. Citron, whether she had any experience or evidence of hate propaganda.

The Chairman: That does not put it on the record, the text of the propaganda. I have ruled twice against doing so.

Senator Haig: Let us take it as an admitted fact that there is hate propaganda being spread around Canada and we do not want to see it.

Senator Prowse: We do not want it on the record where somebody can pick up the record and say, "Look, here is an official document and this is what it says." This is the position we are in.

Mr. Goldstein: If there is any technical way of showing this without it appearing in the record I will be glad to do so.

Senator Croll: After all, you live with facts. There was some suggestion that there is not much of it around. Well, suddenly Senator Prowse gets one from Vancouver that is mailed as from a Red Feather organization. It just so happens that it is there. We see it from time to time and we know it is around; we have all seen it. As Senator Haig said, for all purposes it is admitted. There is no use in flogging the issue; it is there.

Senator Prowse: Perhaps I can put it this way. Mr. Goldstein, is the material you have substantially different from the material reproduced in the Cohen Report?

Mr. Goldstein: Yes. It is not all contained in the Cohen Report.

Senator Prowse: But is it substantially different or is it the same type of thing?

Senator Choquette: There is a lady here who wants to say something.

The Chairman: Certainly, we will be glad to hear from anyone who is here.

Mrs. I. Airst, Member, Association of Survivors of Nazi Oppression: On the question of any recent personal experience with hate propaganda, I would like to say that I have recently been a victim of hate propaganda. When Mr. Beattie was given permission to speak in Allan Gardens there was no law to say he was not allowed to go there and incite hatred and say what he had to say. As a result, we went out to hear what he had to say. The police department was called out, with police on horseback, on motor cycles and on foot, to protect Mr. Beattie so that he could spout his hate propaganda. There was no law to protect us against this hate, but there was a law to protect him in order that he could spout it. As a result, I personally was injured; my foot was crushed by one of the police horses protecting Mr. Beattie's right to incite hatred against us.

Senator Croll: They were not there for that purpose. They were there to give him the right of free speech. Until he opened his mouth they did not know what he would say. He had to open his mouth, and once he did he wound up where he belonged, in jail. He was charged and acquitted on a legal technicality.

Mrs. Airst: But I was hurt before the man had a chance to speak.

Senator Croll: That I do not know. That is unfortunate. That is what the police were there for at that time. When you speak of incidents...

Mrs. Airst: It is not an incident. It is a personal experience that happened recently as a result of a man being allowed to spout hatred without any legislation to prevent it.

Senator Croll: We had all that evidence before. The Beattie record has already been

before us. I do not know who gave the evidence. I think it was the Justice Department.

The Chairman: Yes, Mr. Scollin told us the story, and we have the judgment of the court that there is no law in Canada against what was happening at that time, the libel of a group.

Senator Prowse: I wonder if Mr. Goldstein would like to leave that material with you, Mr. Chairman.

The Chairman: I think that is the solution.

Senator Prowse: Then if it is felt it should be privately circulated, it can be made available to the members of the committee, who can see it without it being put on the record.

Senator Lang: Did this material originate in Canada or abroad?

Mr. Goldstein: Part of the material originated in Canada. One of the main sources of this material was the now defunct Parti de L'Unité Nationale du Canada of the late Adrien Arcand. There is a wealth of material from that source. I have copies of their publications, copies of their programs and copies of books they published. I personally went to see Mr. Arcand at his house and spent a half-day with him to take a closer look at his method and his way of proceeding. I also met relatives of Mr. Arcand's family to see how they operated.

There are local branches of the international Nazi movement. I have a letter here from Colin Jordan, the Nazi leader in Great Britain, appointing people in Montreal as representatives. I have that here in my possession. I also have propaganda letters coming here from Sweden. I have them in my brief case and can show them to you. It so happens that subscribers to a German language Montreal newspaper received it. Obviously there was some clerk who gave out the names of the subscribers and some of them received this material. There is material emanating previously from Alabama from the National Christian Mosaic, which moved its headquarters to Atlanta, Georgia. I have material from the late Lincoln Rockwell's party as well. There are also ethnic group cells of Fascist description. All ethnic groups have a majority of decent, loyal, lawabiding citizens, but they also have extremist wings of Fascist groups.

We have a film of a meeting of a Hungarian Fascist group in Montreal at the time of the Bellefeuille episode when André Bellefeuille from Sorel wanted to start his Canadian Nazi party. This is the kind of material we refer to. People like Laurier Lapierre started a movement to follow it with publicity to prevent it holding meetings. If you ask me how, I will gladly answer; if not we will pass that subject. We used legal ways to prevent the holding of these meetings.

For instance, there was a meeting to be held by the National Unity Party on January 22 last year at one of the biggest halls in Montreal. It was to be attended by people from across the country participating at \$3.50 a dinner. We managed to prevent this meeting taking place. It was a very pleasant sight to see a reporter with a camera on his shoulders being turned away from the closed door, otherwise there would have been another Fascist hate movement spread on the news services. These are the kinds of thing we talk about of which we have first-hand information.

Senator Prowse: Do you have any objection to following my suggestion of leaving that material with the Chairman so that it can be made available to the committee, for our own information? Nobody wants to make this committee a medium for circulating it.

Mr. Goldstein: That would be perfect. It was not my intention that it should become part of the record when I said I could show it. I was not aware that there were two avenues of presenting it to you. I did not intend to propagate it. You realize that, Senator Croll.

Senator Croll: Of course I realize that. I was turning something over in my mind when you referred to a representative of the CBC being turned back from this meeting. Are you sure that was not arranged by the CBC for news purposes?

Mr. Goldstein: He was obviously there to cover the event.

Senator Prowse: You tell us you have a way of preventing this, completely legally and effectively.

Senator Croll: Tell us.

Senator Prowse: No, do not tell us how. You just keep right on doing it.

Mr. Goldstein: The only thing is that the time and expense involved is something that cannot be borne indefinitely by private citi-

zens and it should be done by the state if possible.

Senator Prowse: I agree.

Senator Croll: A law is a law.

Mr. Goldstein: It can be done for a short period but not indefinitely.

Senator Prowse: There is no sense in telling people how you do it because that makes it easier for them.

Mr. Paul Orlan, Member of the Executive, Association of Survivors of Nazi Oppression: If honourable senators wish to hear it, they may be interested to know the fear that we, as members of Survivors of Nazi Oppression, have of this sort of hate propaganda and incitement spreading. We know from first hand what it can bring about, and what it has brought about to each and every one of us sitting here. We are only a small group of survivors, but if honourable senators are interested we can give our reasons and our credentials.

The Chairman: Mr. Goldstein will see me perhaps tomorrow, when we will have a discussion and look through what he has in his brief case. If that is so, honourable senators, the Chair will entertain a motion to adjourn.

Senator Lang: Before adjourning, Mr. Chairman, there are two men I feel the committee should hear. Both are very prominent in the field of civil liberties. One of them, a man who has practised law, who is a practising lawyer in the field of civil liberties and has been all his life, is Glen Howe of Toronto; the other man, whom I feel this committee should hear, is Frank Scott who was at one time Dean of Law at McGill University. He is

now with the B and B Commission. In his early life he was prominent in political circles. Besides being an academician he is a man who has practised law in the civil liberties field. He carried the case of the Quebec padlock law to the Supreme Court of Canada. Both of these men are very knowledgeable about this bill and about the field with which we are concerned. I feel that in all fairness to the committee members, these two men should be asked to testify before the committee.

The Chairman: I presume it is the will of the committee that we invite these two gentlemen to appear.

Hon. Senators: Agreed.

Senator Choquette: I might say, Mr. Chairman, that so far we have had only people who are 100 per cent for this bill. Surely there are some people who would like to be heard who are against it.

The Chairman: I have invited everybody I know to be opposed to it.

Senator Lang: Mr. Chairman, I think it is very important for us to get a balanced presentation before the committee, which I think is not the case to date.

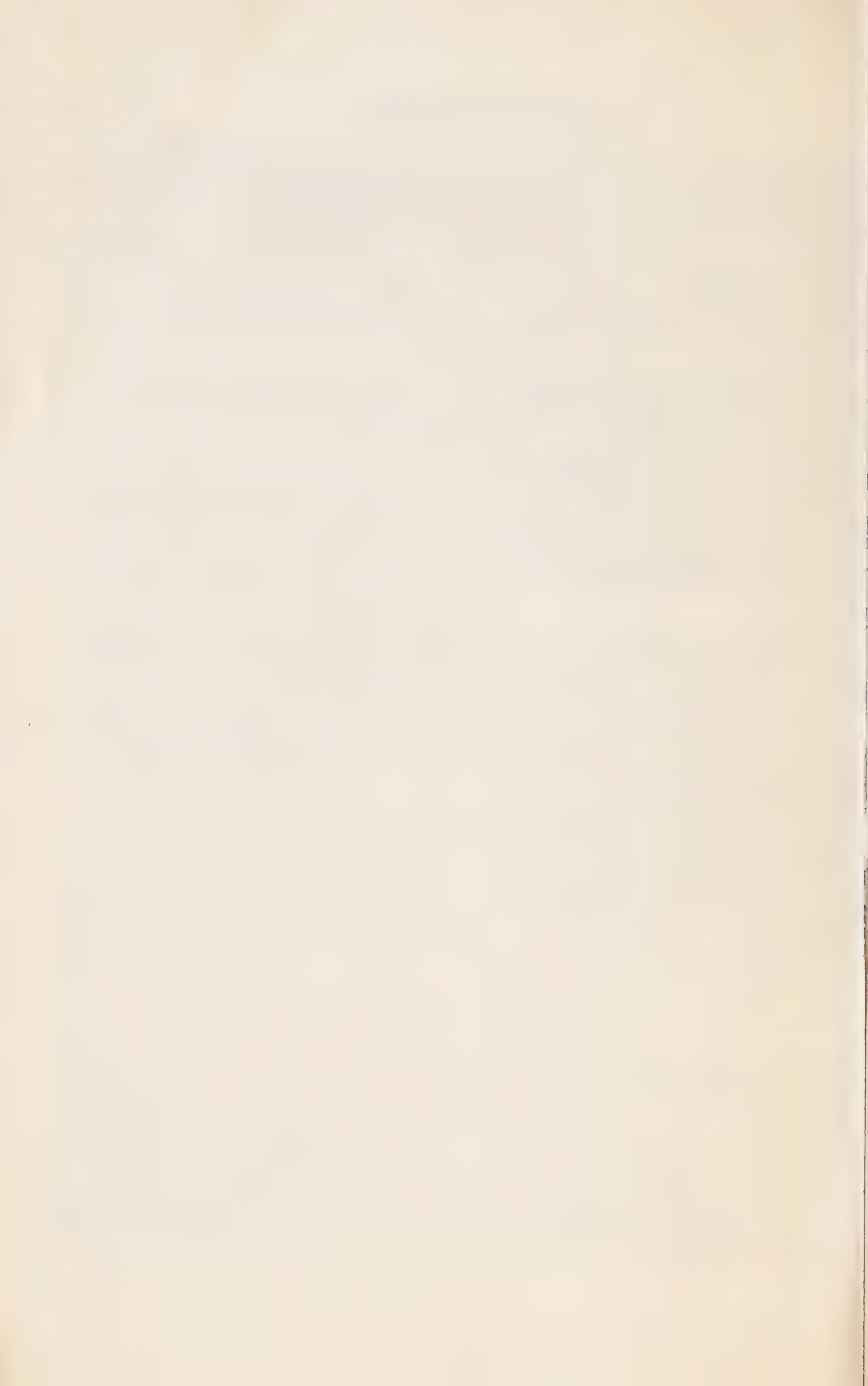
Senator Croll: I am not on the steering committee, but have you turned down anyone who has asked to appear, Mr. Chairman?

The Chairman: No. I have invited others who have not come.

At any rate, is it your wish to adjourn?

Hon. Senators: Agreed.

The committee adjourned.





First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA
PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE
ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 7

Seventh Proceedings on Bill S-21,

intituled:

"An Act to amend the Criminal Code".

TUESDAY, APRIL 22nd, 1969

WITNESSES:

- 1 Canadian Civil Liberties Association: Mr. Eamon Park, vice-president, Dr. Wilson Head, vice-president, Professor Graham Parker, Special Counsel and Miss Jill Armstrong, executive assistant.
- 2 Professor H. W. Arthurs, Associate Dean, Osgoode Hall Law School of York University.
- 3 The Manitoba Human Rights Association: Mr. Melvin Fenson, Mr. Walter Hlady and Mr. G. E. Martin.

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Gouin	Méhot
Aseltine	Grosart	Phillips (<i>Rigaud</i>)
Bélisle	Haig	Prowse
Choquette	Hayden	Roebuck
Connolly (<i>Ottawa</i> <i>West</i>)	Hollett	Smith
Cook	Lamontagne	Thompson
Croll	Lang	Urquhart
Eudes	Langlois	Walker
Everett	Macdonald (<i>Cape</i> <i>Breton</i>)	White
Fergusson	*Martin	Willis
*Flynn	McGrand	

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code".

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative."

Extracts from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally,

and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimbursement as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extracts from the Minutes of the Proceedings of the Senate, Tuesday, March 11th, 1969:

“With leave of the Senate,

The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, April 22nd, 1969.

Pursuant to adjournment and notice, the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Choquette, Cook, Croll, Eudes, Fergusson, Flynn, Gouin, Haig, Macdonald (*Cape Breton*), McElman, Phillips (*Rigaud*), Urquhart, Walker, White and Willis.

In Attendance: E. Russel Hopkins, Law Clerk and Parliamentary Counsel.

The following witnesses were heard:

1. Canadian Civil Liberties Association: Mr. Eamon Park, vice-president, Dr. Wilson Head, vice-president, Professor Graham Parker, Special Counsel and Miss Jill Armstrong, executive-assistant.

2. Professor H. W. Arthurs, Associate Dean, Osgoode Hall Law School of York University.

3. The Manitoba Human Rights Association: Mr. Melvin Fenson, Mr. Walter Hlady and Mr. G. E. Martin.

At 5:15 p.m. the Committee adjourned to Thursday, April 24th, 1969, at 2 p.m.

ATTEST:

L. J. M. BOUDREAUULT,
Clerk of the Committee.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Tuesday, April 22, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The Chairman: Honourable senators, it is 2 o'clock and we have a big program for this afternoon, so let us commence. Three groups will be making presentations to us, and I think we can devote an hour to each of them.

Before we hear the first submission I have something to bring to the attention of the committee. Honourable senators may remember that Senator Lang—and I am sorry that he is not here; he told me that it would be impossible for him to attend this afternoon—asked for an opinion from the Department of Justice in regard to the position of the Bell Telephone Company. The company has said that it cannot stop people using their lines for blackguarding purposes. I undertook to submit the question to the department, and on March 21 I wrote to Mr. Maxwell, Deputy Minister of Justice, in these words:

At a meeting on Tuesday last, of the Senate Standing Committee on Legal and Constitutional Affairs, when we were examining Bill S-21, in connection with Hate Propaganda, one of the members, Senator Lang, requested that an opinion be asked from the Department of Justice as to the legal right, power and authority of the Bell Telephone Company with respect to the use made of its private lines. At a previous meeting of the committee, a representative of the company assured us that because of the terms of their charter and other statutory law, the company was required to supply telephone accommodation to any citizen who applied and had no power to exercise

censorship over what passes over the private line, so long as it does not violate laws such as being blasphemous or indecent.

I enclose an excerpt from the official record of the meeting in question, in which you will observe that the senators generally concurred in Senator Lang's request for the department's opinion. If this request meets with your approval, could you let me have your reply by...

and I set a date with which he could not comply. However, I now have his reply, and I shall read it all into the record:

I apologize for not replying sooner to your letter of March 21, 1969, in which you informed me that the Standing Committee on Legal and Constitutional Affairs has asked for the opinion of the Department of Justice as to the legal right, power and authority of Bell Canada with respect to the use made of its private lines. You point out that at a previous meeting of the committee a representative of the company expressed an opinion as to the company's obligations under the terms of its charter and other statutory law.

As I am sure you will understand, I would be most pleased to give your committee any assistance within my power and indeed, in connection with the present bill, I think we have provided every assistance possible within the limits of the duties and authority of the department. I regret, however, that I am not in a position to give the opinion requested, particularly as it involves expressing views in relation to the specific statutory rights and obligations of a private person or corporation.

Constitutionally and historically, as well as under the express terms of the *Department of Justice Act*, the Minister of Justice and Attorney General

is the official legal adviser of the Government and of departments and agencies of Government. Consequently, it is not his function or duty, and therefore not the function or duty of his deputy or any other of his officers, to give legal advice to a committee of Parliament. Moreover, they would find themselves in an impossible conflict of duty if they were called upon to advise a Parliamentary committee with respect to a matter on which they have advised or may be asked to advise the Government. There is the further circumstance that legal advice given by the Department of Justice or by the Attorney General of Canada would not necessarily be accepted as binding upon Parliament or any committee of Parliament and would not necessarily be treated as conclusive in relation to the issues involved.

The foregoing principles have been traditionally established and recognized and have on various occasions been stated by my predecessors. In these circumstances, I am sure you will understand that I do not feel free to depart from them in this case.

I do not suppose there is any comment in connection with that; that is final.

Senator Haig: He is just not going to give an opinion.

The Chairman: That is all, so you cannot quarrel with his opinion!

As I said, we have three very important delegations here this afternoon. It was arranged nicely among ourselves that I should call on the Canadian Civil Liberties Association to make the first presentation. We have here, very fortunately, Mr. Eamon Park, whom I have known for many, many years. This will not be the first passage between us, I can assure you. He is Vice-President of the Canadian Civil Liberties Association. We also have Dr. Wilson Head, who is a Vice-President as well, and Professor Graham Parker, Special Counsel. I am sure they will arrange among themselves who addresses us and the order in which they address us.

We have been making it a practice to adjourn at 3 o'clock in order to put in an appearance in the chamber. The Senate will be meeting while we are in session, but the senators like to go into the chamber and make the bow to the Speaker and then return to the committee. It has worked satisfactorily

so far; everybody has come back, I am glad to say. It is understood that at five minutes to three we will adjourn for, say, twenty minutes and then continue.

Would the representatives of the Canadian Civil Liberties Association now come forward? Mr. Park, do I understand you are leading?

Mr. Eamon Park, Vice-President, Canadian Civil Liberties Association: I will lead off for the Canadian Civil Liberties Association, honourable senators. We have presented you with a formal brief outlining our point of view, with the intention that I should perhaps read the brief, after which if there are any questions on it you might call upon myself or any of my colleagues to reply.

The Chairman: That is perfectly satisfactory if you would proceed.

Mr. Park: Honourable senators, like most others in this country, the Canadian Civil Liberties Association is deeply troubled by the dilemmas which are posed in the hate propaganda problem. This issue sets two of the most cherished values of a democratic society in conflict with each other. The right of free speech runs into conflict with the right to live in dignity. Civil libertarians, of necessity, are committed to both.

We seek to protect the dignity of our minority groups against the fear and anxiety which are generated by the revival of Nazi obscenities. We seek simultaneously to preserve and perpetuate the right of all Canadians to speak their minds. Believing as we do that both of these values are vital but that none of our values is absolute, the problem with any legislative proposal is how to secure the best balance between the right to speak one's mind and the right to live in dignity. There is one additional value which civil libertarians, like most other Canadians, are determined to safeguard. That value is social peace. In a situation of physical disorder and violence, no one can enjoy meaningfully freedom of speech or a dignified existence.

A word about the special status of freedom of speech. Even though it is not an absolute, it is nevertheless the value which distinguishes our form of government from all others. The right of free speech enables us to mobilize the support of others to rectify the wrongs for which we seek redress. The assumption is that unjust governments and unjust policies are not as likely to survive in an atmosphere of free public debate. In this sense, freedom

of speech is central to democratic government. It is the freedom on which our whole complex of freedoms depends.

By its very nature, freedom of speech implies certain risks. In order to generate support for our grievances, we might ignite passions and tempers. In fact, our most vital social reforms have often been accompanied by bitter social tension. Herein lies the dilemma—too much tension can spawn violence; too little tension can prolong injustice. Our problem is how and where to balance these risks. Legislation on hate propaganda dramatizes the continuing dilemma of democratic society.

The most controversial concept in the current Bill is found in Section 267B which creates an offence for inciting "hatred or contempt" against persons because of race, ethnicity, etc. Many useful utterances in a democratic society incite what could be described, at the very least, as bitter feelings. The dividing line between creative tension and destructive hate will often be very difficult to draw. For example, if a French-Canadian nationalist were to denounce English Canadians for the exploitation of French Canada, could it be said that he was inciting "hatred or contempt" of English-speaking Canadians? If an Indian were to heap blame for his poverty upon the white man, could he be said to be inciting "hatred or contempt" for white people? If a Jew were to indict all of Germany for the atrocities of the Nazis, would he be inciting "hatred or contempt" against Germans?

Whether or not one agrees with the kinds of views which we have used in the foregoing examples, it would be unfair, unwise, and undemocratic to make them illegal. Yet, we run the risk that the formulation, "hatred or contempt", could lead to precisely such a result.

Moreover, we fear that the defences which are provided in the Section may not be adequate to protect many legitimate exercises of free speech. The defence of truth will have very little application in view of the fact that most utterances in the political arena deal with opinion rather than fact. The immunity conferred upon subjects of "public interest" gives the courts far too much power to set the framework of democratic political polemics. On the basis of what criteria and in the light of what kind of evidence will the courts determine whether a matter is in the public interest?"

Section 267 B (1), while containing the same problem regarding the interpretation of the words "hatred or contempt" adds an additional problem in prohibiting incitements which are "likely to lead to a breach of the peace". The difficulty with this is that it punishes the speaker not only for inciting violence against others, but also for attracting violence to himself. If, to use one of our examples above, a Canadian Indian were denouncing the sins of the white man in a place where there was substantial anti-Indian prejudice and it was likely that he would be attacked for what he said, he, the Indian, might be guilty of an offence. Surely, this is a risk we do not wish to take. History has taught us that so often tomorrow's social reform grows out of today's verbal attack.

Similar problems are contained in Section 267C. For an analysis of these dangers, we reproduce the words of Prof. Walter Tarnopolsky:

The dangers inherent in the new offences proposed by Bill S-49 (as it was then) are even more serious when one considers Section 267C. It provides that a publication, copies of which are kept for sale or distribution, may be seized under warrant issued by a judge 'who is satisfied by information upon oath that there are reasonable grounds for believing' such publication is 'hate propaganda', i.e. a 'writing, a sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under Sub-section 2, section 267B'. The owner and author of the publication seized may appear to be heard, but 'if the court is satisfied that the publication is hate propaganda' it may order its forfeiture. Booksellers beware! Clearly, all copies of "Mein Kampf" would have to be moved if kept only for sale for members of a Political Science class. What about Alan Paton's "Cry the Beloved Country"? Doesn't it wilfully promote hatred against the dominant white race in the Union of South Africa? What about the writings of James Baldwin? Is it not possible that some judges would be 'satisfied' that some of his works constitute wilful promotion of hatred against white Americans?... it is not absolutely clear that defences set out in Section 267B (3) would be available to prevent forfeiture under Section 267C.

Furthermore, this defence under Section 267 B (3) is available only when an accused can also prove that on reasonable grounds he believed the statements to be true. Who is it that must prove in forfeiture proceedings that on reasonable grounds he believed them to be true? Is it the owner of the book or the author? What about the defence of the truth? What would be required to show that the statements contained were true?¹

The small citation marks which I have used throughout indicate where identification appears at the end of the brief.

Thus, it is clear that Sections 267 B and C involve great risks to the free speech of a wide variety of people, many of whom bear no resemblance to the Nazis or hate mongers who sparked this bill. Are these risks justified by the evidence of trouble or potential trouble to the target groups and the social peace of this country? The Cohen Committee, itself, has declared that the hate-mongering problem in Canada cannot be described "as one of crisis or near crisis proportions".² Thus we face no "clear and present danger".

If I may add—and I think this represents the views of the Committee—the situation at the beginning of 1965, when the Cohen Committee was established, was more serious, in our judgment, than the situation which prevails at this moment. We think that the Canadian public has responded in its own way to the dangers which possibly were before us prior to the establishment of the committee.

What of potential dangers? In our view, while we do have a problem of discrimination and inequality in this country, the breeding ground for extremism is not very fertile. We believe that this is verified by our experience with human rights legislation.

Almost invariably, when the Ontario Human Rights Commission, one of our most active Government bodies in the field of race relations, has uncovered an act of discrimination, the discriminator has surrendered. Out of several thousand complaints only about fifty have required public boards of inquiry. In these instances, the establishment of public hearings into the discriminatory conduct led only twice to the accused being prepared to fight on. In every other case, the accused settled with the Ontario Human Rights Commission and made amends for the acts of discrimination. The comments of Dr. Daniel

G. Hill, Director of the Ontario Human Rights Commission, are worth noting:

...there has been an overwhelming disposition on the part of most of the accused to settle with the Commission after a Board has been announced. ...the majority of people with whom we deal prefer to settle or demonstrate acts of good faith.

The fact that those who practice racial discrimination having capitulated so readily suggests that, despite our problems, the Canadian public is essentially receptive to human rights and antagonistic to racial discrimination. If this were not so, surely we could expect greater resistance from our racial discriminators. Thus, we can more readily accept Dr. Hill's conclusion:

...the Canadian public is relatively immune to extremist, anti-Semitic and other 'hate' materials.

Being non-absolutists, if we were satisfied that the social climate of this country were presently and potentially more conducive to the revival of Nazi strength, we might have no serious objection to Sections 267 B and C in their present form. Nor would we object very strongly, if we believed that these sections would restrict only the invective of the hate monger without endangering the utterances of others. It is always a question of balancing risks. In our view, the social climate in this country at this time does not warrant taking all of the risks which we have indicated to the free speech of non-Nazi groups in this community.

Moreover, we are not satisfied that the provision with which we are dealing would provide such adequate protection to the target group. Even if, or especially if, legal action were somehow confined to the Nazi element that precipitated the introduction of this bill, we fear the consequences for the target group which is supposed to be protected. So long as truth and reasonable belief in the truth of the impugned statements are defences to one of the charges, we can expect the hate mongers and Nazis to get into the witness box and harangue the court with their anti-Semitic invective. With the assistance of the proposed legislation, there would be a judicial forum to propagate racist obscenity. In consequence, we might anticipate a far larger audience for ethnic hate than any which the hate monger is at present able to command.

The only provision of this bill to which there could be no serious objection on our part is the principle contained in the proposed Section 267 A prohibiting the promotion and advocacy of genocide. We find it difficult to conceive of a situation where any social benefit would result from the right to advocate genocide. That being the case, it is our view that in such situations freedom of speech might undergo some modification because of our social interest in securing the right to live in dignity for the target group and the maintenance of peace and harmony for the entire community. We note, of course, that no defence of truth or reasonable belief in the truth is available on a charge of advocating genocide.

However although the principle contained in this section is not objectionable, some of the detailed provisions may constitute an unnecessary risk to freedom of speech. For example, Section 267 A (e) would make it an offence to advocate "forcibly transferring the children of the group to another group" with the intent of destroying the group. Could it be argued that the proposals to impose integrated education upon the children of Doukhobors or Indians, for example, might fall within this prohibition? The risk contained in this subsection is that a court might be persuaded that the proposal to transfer children in such a way is intended to "destroy" a culture, i.e. a group. Clearly, whatever one thinks of compulsory integrated education, the advocacy of it in such circumstances should not constitute a criminal offence. In our view, the concept of genocide should be limited to physical destruction.

As we have indicated, there is not enough evidence of danger to the social peace or to the target groups to warrant taking the risks to freedom of speech inherent in the balance of the bill. Prior to the publication of the Cohen Report, there were other recommendations for dealing with the problem of hate propaganda. In this connection, we refer to submissions which had been made in 1953 by the Canadian Jewish Congress and in 1965 by the Canadian Labour Congress. At that time, those organizations proposed legislation which would make it illegal to publish statements which were designed to incite violence or disorder against groups and their members because of the group's race, religion, colour, ancestry, nationality, place of origin, ethnicity, or language. Clearly, the formulation "violence or disorder" runs fewer risks to useful social debate than the formulation "hatred or contempt".

The proposal was made as an extension to the concept of sedition which already appears in the Criminal Code. Some years ago, judicial decision defined sedition in such a way that only Government authority was protected from the incitement to violence and disorder. In view of the fact that inter-racial violence is a tactic often employed by totalitarians in their quest for power, there might be no serious objection to the extension of sedition in this way.

Another reason for our reluctance about the bill in its present form grows out of our conviction that there are alternate weapons available to contain the extremists. We believe that the emphasis should be directed not primarily at outlawing the words of the hate monger, but rather at improving the social context in which he seeks to operate. Our efforts should be focussed essentially upon further immunizing the Canadian public from the message of the hate monger.

In this connection, we recommend strengthening human rights legislation and administration around the country. A stronger program against discriminatory deeds will weaken the impact of bigoted words.

Before looking at specific measures by which we can strengthen our general human rights activities, let us examine something of the character of our inter-group situation.

The key racial problems in today's Canada arise less from extremist name-calling than from basic inequality. Generations of discrimination have left us a legacy of inequality.

Note, for example, the observations of sociologist Rudolph Helling regarding his survey on minority groups in Windsor, Ontario:

Only a few Chinese are employed outside of the traditional food and personal service areas.

Yet Helling also points out: "The majority of the Chinese are relatively poor". On Negroes, Helling says: "...Negroes are underrepresented in skilled and technical occupations ... There are few other occupations with apprenticed skills which employ Negroes".

John Porter's classic analysis "The Vertical Mosaic" points up this basic inequality:

The immigrants of non-British or non-U.S. origin got into the economic elite scarcely at all. ... As far as ethnic background is concerned, it is clear that preference for recruitment to the economic

elite is for English-speaking people of British origin.

It is trite knowledge in Canada that this holds true even in the Province of Quebec with its overwhelming French population. A minority of Anglo-Saxons continues to occupy the central positions of economic power in the private sector of Quebec's economy. Porter also points out that the Jews, one of the most "highly educated" groups in the country, "are scarcely represented at the higher levels of Canada's corporate institutions."

In the case of Canada's native Indian population, inequality has reached a desparate state. Recent surveys tell us that in Canada:

Seventy-five percent of Indian families live on an annual income of \$2,000 or less; forty-seven percent on \$1,000 or less. Indians require welfare at ten times the national average and their pre-school children are dying at eight times the national average.

In the words of a recent Indian submission to the government:

Unhappily we must report that the last 100 years have visited an unimaginable deterioration in the life of the Indians of this country. A once proud and industrious people have suffered a degree of poverty, unemployment, disease, mortality, and discrimination out of all proportion to its members.

The welfare of our target groups and the ultimate social peace of this country are far more threatened by these conditions of inequality than all of the hate literature compiled in the Cohen Report. Indeed, we note that the Cohen Report itself has indicated the need for Canadians to address themselves to these problems. Unfortunately, however, the bill before us purports to deal with the less vital aspects of the problem.

At the moment, the Fair Employment Practices Branch of the Department of Labour has a very small full time staff with which to enforce the Canada Fair Employment practices Act. As a result, the enforcement duties are left to labour conciliators throughout the country to handle on a part time basis. Officials of the Central Mortgage and Housing Corporation enforce the anti-discrimination provisions of the National Housing Act, also on a part-time basis. In our view, part-time enforcement conveys half-hearted interest. If government does not exhibit more interest, we cannot expect the community to do so.

Indeed, on a number of occasions, even government officials have been found violating our human rights legislation. Recently, both the Jewish Labour Committee of Canada and the National Human Rights Committee of the Canadian Labour Congress uncovered evidence that officials of the Canada Manpower Centres were processing discriminatory job orders.

A more vigorous government initiative is required. We propose that the federal government station full-time human rights staff in key centres throughout the country. The role of the staff would be to go into the community and, in co-operation with provincial agencies, promote positive compliance with our fair practices laws. They should publish and distribute literature to employers, personnel managers, placement agencies, manpower centres, builders, real estate agencies, educational institutions, churches, unions, mass media, minority groups, etc. Such literature should persuasively inform all segments of our society of their rights and duties under this legislation. Government staff should initiate face-to-face meetings, conferences, and seminars in the more vital areas of our community. They should appear also at school assemblies, trade conferences, and meetings all over the country, conveying the message of human rights and racial equality.

Government human rights administrators should also embark upon "positive opportunity" programs. Without waiting for complaints, they should go to industry, minority groups, and other community leaders in an attempt to recruit voluntary co-operation for positive programs designed to increase opportunities for minority groups. This means co-ordinating job opportunities and minority group candidates. With the prestige of government brought to bear, there is a good chance that many employers, community leaders, and trade unionists will agree to sit down with minority group agencies and work out a program of placing people as opportunities arise. The role of government would be to open the channels of communication and bring all parties together. Subsidies should be made available to those employers willing to provide on-the-job training to compensate for deficiencies in educational background, Economic development programs should be undertaken in areas suffering from "regional disparities". The key to the success of such a program is that government must initiate. Subsidy programs and economic development opportunities will lie dormant unless someone

specifically promotes their use. Government must be the catalyst.

Government must also sponsor scientific research into the difficulties and problems of intergroup relations. Out of this increased knowledge and information will grow new techniques for combatting discrimination and promoting equality in this country.

The objective is for government resources virtually to saturate this nation with a concern for human rights and racial equality. Clearly, this is not a plea for tender lectures on the merits of brotherly love. Rather, it is a call to involve the entire community in action to bring about conditions of equality. What we hope to achieve is a situation where all over the country people of different groups and backgrounds will be engaging in face-to-face co-operation to solve common problems. Such co-operative efforts involving black, white, Indian, non-Indian, Protestant, Catholic, Jew, employer, trade unionist, the old, the young are bound to have a spill-over effect. Enlightened attitudes, acceptance of and respect for differences, are more likely to emerge from enlightened behaviour, actual cooperative experience.

With all segments of our community involved in activities promoting the conditions of equality and dignity, the Nazi and the hate monger will be operating in a virtual vacuum. In this way, we can simultaneously weaken neo-Nazi influence and strengthen human rights performance. All of this with far less risk to freedom of speech.

NOTES:

1. "Freedom of Expression Versus the Right to Equal Treatment", Prof. W. Tar-nopolsky, 1967 UBCL Rev 43 at page 61
2. Report of the Special Committee on Hate Propaganda in Caada, November 10, 1965, page 59
3. From a lecture entitled "Protecting Human Rights in Ontario" delivered by Dr. Daniel G. Hill to the University of Toronto lecture series sponsored by the School of Social Work, November 27, 1967
4. The Cohen Report, *Op. Cit.*, page 27
5. *Boucher v The King* 1951 2 DLR 369
6. The Position of Negroes, Chinese and Italians in the Social Structure of Windsor, Ontario. A Report submitted to the Ontario Human Rights Commission by Rudolph A. Helling, Ph.D., Department of Sociology and Anthropology, University of Windsor, December, 1965, page 56

7. *Ibid.* page 12

8. "The Vertical Mosaic", John Porter, page 287

9. *Ibid.*, page 88

10. A Brief to the Minister of Indian Affairs by the Union of Ontario Indians, January 12, 1967, page 1

11. *Loc. Cit.*

Mr. Chairman, thank you very much for the opportunity to present our views to your committee.

The Chairman: Thank you, Mr. Park. Dr. Head, have you something to add?

Dr. Wilson Head, Vice-President, Canadian Civil Liberties Association: No, Mr. Chairman, but if there are questions I would be very happy to answer them.

The Chairman: Yes. Professor Parker, have you anything to add?

Professor Graham Parker, Special Counsel, Canadian Civil Liberties Association: No, Mr. Chairman, but I am prepared to answer questions also.

The Chairman: Members of the committee, have you questions to put to these witnesses?

Senator Walker: May I, Mr. Chairman, congratulate Mr. Park on a well-reasoned and well-rounded out presentation backed up by a great deal of valuable authority. I particularly note page 4 where he says:

The Cohen Committee, itself, has declared that the hate-mongering problem in Canada cannot be described "as one of crisis or near crisis proportions". Thus, we face no "clear and present danger".

You were saying, Mr. Parker, that you thought the climate was better than it was when the Cohen report was written three years ago. I share that view. Would you be good enough to tell us if you know of any incident in Canada in the last three years, outside of Beattie, which would indicate there is a need for this legislation?

Mr. Park: Offhand I cannot recall any specific incident. Maybe some of my colleagues can. I think there have been a number of problems involving racial discrimination in various parts of Canada, but I think most of those that have arisen are capable of solution and handling by the various human rights codes. I think that to the extent that those

human rights codes have been strengthened we are better off. Other than that of Beattie, I know of no specific additional situations.

I do think that there was a time when every one was very much concerned, and had we been speaking to you in 1965 our brief might have had a different tone. Our feeling now is that the situation is more in hand. Whether the exposure of Beattie and what he stands for has conditioned the Canadian public to be aware of the situation, I do not know, but our feeling is that a continuing of that educational process plus the strengthening of human rights activities that we indicate we desire is a better way of proceeding at this time. There is no situation of crisis. We would not say that in a situation of serious crisis something of this sort of legislation is not needed. I think what we are saying is that we are sympathetic with the purposes of the legislation, but we are concerned that the form the legislation has taken may inhibit certain other forms of expression that are desirable in our political situation. In the case of Beattie perhaps we are taking a sledge hammer to smash a gnat, and it will come back to harm us in other areas.

Senator Walker: Is it not remarkable to see the way in which the Canadian public has ameliorated in its attitude towards groups? This thing of hatred—which is perhaps the best word to describe it—is really dying out in Canada, is it not?

Mr. Park: I would hope it was. I would not be absolutely sure that there were not situations in which at least contempt for certain racial groups continues to be a problem in Canada. I would think that even in the crisis we have had between French and English Canada there has been an amelioration of feelings across the country.

Dr. Head: I wonder if I might say a word about this? I would be very concerned about the fact that some of the more recent happenings which probably would be covered by this were affected. There are uprisings by young students on campuses; Indians are demanding their rights and demanding "Red Power"; a certain number of blacks in this country are demanding "Black Power," and that might be affected by this kind of legislation. Obviously these people are not advocating genocide or anything else, but they are speaking their own will, sometimes in inflammatory language. These people who feel they have been dispossessed, exploited, manipulated and discriminated against do not speak in say,

silk-stocking afternoon-tea type of language, and that kind of thing could be pointed to as suggesting that they were inciting violence etc. I am convinced that many of these people are expressing feelings that are honestly and very, very strongly held. I think in some ways what they are saying is, "The only way we can get the Canadian public to respect and react to what we are saying is by saying it in inflammatory language." I would hate to see the Canadian public subject this to an inhibiting test and try to suppress a very healthy expression of discontent.

Senator Choquette: The writings all over the wall of the Canadian Indian Pavilion at Expo were reproaches by the hundreds to the white people, saying: "We opened our hearts, tents and houses to you, and what did you give us in return?" There was a whole list of grievances against the white people. Would that be considered as inciting hatred against the whites? That is just an added example to what you have already said.

The Chairman: Could whites be considered a group?

Mr. Park: I would think they could.

The Chairman: Perhaps it is rather extravagant.

Mr. Park: In a very broad expression.

The Chairman: I would think so.

Mr. Park: I suppose in the United States at the moment to the black person "white" is an expression of a group.

The Chairman: Are there any further questions or observations?

Senator Macdonald: Could the witness tell us something about the Canadian Civil Liberties Association, its aims and objects and how many people it represents?

Mr. Park: It is an association dedicated to the protection and expansion of civil liberties for Canadians, and it is concerned with the extension of those rights. It has existed now for a number of years. It has been served by a number of very distinguished persons in its offices. Professor Mark MacGuigan, now Member of Parliament for Windsor-Walkerville, was one of the former presidents. The president at the moment is the Honourable J. Keiller Mackay.

Senator Walker: He would be very much against a bill like this, would he not?

Mr. Park: I cannot speak for him personally, but he is one of the officers of our association. Others are Professor H. W. Arthurs, Faculty of Law, Osgoode Hall, June Callwood, Professor G. Horowitz, Faculty of Political Science, University of Toronto, Reverend Donald Gillies, Mr. Julien Porter, Dr. Martin O'Connell, Professor D. P. Gauthier, and Dr. Wilson Head, who is present here today. A large number of both academics and legal people are on the board.

I may say that this brief was very thoroughly considered by a large attendance of the board, and it was revised and rewritten several times. It is not somebody's snap judgment about the subject. The final wording of the brief, I would say, represents an overwhelming opinion of our board, whose membership I think I could reasonably claim is highly qualified in this field. It is their overwhelming point of view that is expressed in the brief I presented here. I would not say 100 per cent, but I would say of the people who sat in on the discussions and that would be a large part of our board, represents at least 95 per cent viewpoint.

The Chairman: Have you a membership?

Mr. Park: Yes, there is a membership. Miss Armstrong is the executive assistant. There are individual memberships and the board is elected by annual meetings. Most of the central activity is in the City of Toronto. There are associated groups with us in other communities in the country.

Again, Miss Armstrong could tell us better of those particular ones.

The Chairman: What is the membership, Miss Armstrong?

Miss Armstrong, Executive Assistant, Canadian Civil Liberties Association: Mr. Chairman, and honourable senators, it is approximately 300 to 400 at the present time.

The Chairman: I think I am a member myself.

Miss Armstrong: Yes, you are, sir, and in good standing. The association had its beginning after the Second World War. On the west coast a group of Japanese Canadians were being persecuted and driven from their property, and the association was begun by a small group of dedicated lawyers. Mr. Irving Himel and a board of directors thought of rejuvenation about four or five years ago with generous grants, one from the Atkinson Foundation.

Mr. A. Alan Borovoy has been on our staff for about a year now. A fully-qualified lawyer, he has had 10 or 12 years' experience in the field of civil liberties and human law. He has carried briefs on behalf of many disadvantaged groups, most of which briefs have been successful. He organized in 1965 the march of Kenora Indians upon city hall. Forty or fifty Indians took part in that march, and every demand in their brief was met.

He also organized the Afro-Negroes about 1965 and since then the slum of Afroville has been razed and better housing has been erected. Negroes, more importantly, have a strong social base upon which to function and operate equally in our society. As Mr. Park pointed out, our board of directors comprises a very broad spectrum of professional areas. He, of course, is the very well-known labour leader. We have sociologists, social workers, lawyers, academics of every discipline, philosophy, history, law, and so on, as well as a number of practising lawyers who are very well known in their fields of criminal law.

We have writers, journalists, and just about every area of human affairs that would be representative of the people whom we are serving.

The Chairman: What has not been brought out is the fact that Mr. Himel—who at that time I think was president of the organization—suggested to the Senate an inquiry into human rights and fundamental freedoms. That inquiry occupied our attention for two sessions some years ago and resulted in a very valuable report.

Senator White: When there are court cases which your association feels involve an issue of civil liberties, do you have the legal staff to take care of it or assist the accused?

Mr. Park: We have, as has been suggested, Mr. Alan Borovoy, the Executive Director of the Civil Liberties Association, who is also a lawyer. He has acted in a number of cases.

The facilities of the association itself are limited, as far as being able to provide legal services, though we have done so in a number of cases and we have always acted as a referral case for anyone who feels they have a civil rights case.

Mr. Borovoy has acted as counsel in a number of discrimination cases over the years, before the Ontario Human Rights Commission, which deals with what are believed to be violations of the human rights code.

Senator White: Suppose there should be such a tragedy that this bill should pass and become law, if there are any charges laid, apart from genocide, under the bill, would you express an opinion as to whether or not your association should feel they should come to the assistance of the accused?

Mr. Park: I do not want to make an outright commitment.

Senator White: Just your own opinion?

Mr. Park: My own private opinion is that we would entertain them, if there were anyone facing prosecution and we thought that, under a bill such as this, or any other bill for that matter, there was a civil rights issue involved. We would certainly interest ourselves in it. The battery of lawyers who are on our board is composed of the kind of people who would be concerned about that kind of case and I am sure would interest themselves in it, even from the individual point of view, as well as from the association point of view.

The Chairman: Thank you very much. There are no further questions. We wish to express our thanks to you for a thoughtful address. You may be sure that it will be carefully considered by our committee.

We will adjourn now for twenty minutes, so that members may attend the sitting of the Senate.

(Short recess)

Upon resuming:

The Chairman: Honourable senators, we have again a quorum and in view of the pressure of numbers this afternoon I think we should proceed at once.

I have the pleasure of introducing Professor H. W. Arthurs, Associate Dean of Osgoode Hall Law School. I am sure that we will have a very fine address from him. Professor Arthurs, the audience is yours.

Professor Harry W. Arthurs, Associate Dean, Osgoode Hall Law School of York University: Thank you, Mr. Chairman. Honourable senators, I should like to repay the honour this committee does me in affording me this opportunity to testify by doing so in a frank, and I trust, a useful manner. At the outset, I must say that I have no illusions about the popularity of the position I am going to take, either with respect in this Committee, or in the country at large. I am

here today as an opponent of legislation which is the product of the report of a committee of which the Honourable Prime Minister was a member, which is sought by significant and diverse religious, social, and political groups in our community and which is endorsed by many men and women whom I respect, and whose motives and intellectual abilities I admire.

Let me add, should this be necessary, that although I appear today as an opponent of the Bill to outlaw hate propaganda, I am no friend of those who disseminate it. I am Jewish, and indeed I am a sometime member of the legal committee of the Canadian Jewish Congress. Needless to say, I do not appear as their spokesman on this particular issue. Likewise, I am a Vice-President and founding member of the Canadian Civil Liberties Association, but they have made their own submissions indicating their reservations about this legislation, and it is not as an officer of that organization that I appear today.

I interpolate to say that in all candour I did have something to do with their brief and you may detect certain similarities between my submission and theirs.

Rather, I am here as a citizen who is concerned to preserve both liberty and amicable group relations in this country, but who fears that much harm will be done to the former, with little benefit to the latter, by the proposed legislation.

2. Free Speech in Canadian Society

I will not claim the time of this Committee in order to expound the absolute centrality of free speech in a parliamentary democracy. It is the means by which—through debate and persuasion, through appeal to public opinion—changes in social, economic, political, and religious values are sought and sometimes secured. It is equally obvious that these changes, brought about through orderly processes, depend upon the existence of a “market place of ideas” in which contending wares vie for the attention and affection of citizen-consumers.

It is likewise trite to observe that many ideas, once thought wrong or even pernicious, have become commonplace and even meritorious. Nor is it always possible to cull from the rich crop of absurdities and even falsehoods which are propounded by those who speak and write in public, those few germs of insight and revelation which move civilization ahead. It has been wisely observed

that "many truths ride into history on the back of error".

To this point, I am sure, there will be no disagreement between us. "But", to approach the watershed "free speech is not an absolute". Conceded. What then justifies interference with free speech? In my view, free speech should only be interfered with to the extent necessary to preserve the very fabric of society against a "clear and present danger".

No doubt it will be said—and has been said—that the law already interferes in many ways with freedom of speech. Reference has been made to the law of criminal libel, to criminal code prohibitions against blasphemy, to the tort of defamation, and to a host of other inhibitions upon the right of public appeal. I would respectfully submit that this Committee should view such existing restraints as a ground for impugning the Bill, rather than for endorsing it.

The recent trend of our law has been to expand the area of free speech, rather than to contract it. Until recently, dissemination of information about birth control was prohibited because it gave offence to some sectors of the community; until recently, various forms of artistic expression were labelled pornographic and suppressed; until recently, those in a position of authority could (and occasionally still do) vindicate their commitment to existing social values by invoking the law of criminal and civil libel or contempt of court. But gradually the burden of these restraints is being lifted; gradually we are coming to realize that the people can and must be trusted, that political or moral or social good taste cannot be enshrined in law, and that those who pose as our custodians and protectors may gradually come to dominate and inhibit us. This development is the hallmark of a healthy and self-confident democracy.

In short, I am not much impressed with the argument that speech is not "free" now, and therefore can be made even less so. The very existence of present restrictive laws is the reason for not adding to them.

3. Is There Evidence to Support the Enactment of Criminal Legislation Against Hate Propaganda?

The Special Committee on Hate Propaganda clearly did not find that there existed in 1965, at the time of its report, a "clear and present danger" to Canadian society. To quote but one of the many statements to this effect

in the report, the committee stated at page 59:

The amount of hate propaganda presently being disseminated and its measurable effects probably are not sufficient to justify a description of the problem as one of crisis or near crisis proportions.

The Committee, of course, went on to indicate that there was a risk that "given a certain set of socio-economic circumstances... public susceptibility might well increase significantly". By its own admission, then, the committee appears to indicate that if there is any danger to Canadian society it is neither "clear" nor "present".

It is now almost 3½ years since the committee reported. During this period of time, proponents of the legislation have been unceasing in their efforts to have it adopted, and have been thwarted (apparently) only by the fact that this Bill has had to joust for priority on the legislative timetable with other, more pressing, matters. Nonetheless, the last 3½ years have added a new and significant dimension to our understanding of the situation. For during this time, without the repressive effect of criminal legislation, the trickle of hate propaganda—it was never a torrent—has shrunk to the point where it is no more than a residual and putrid puddle.

Far from infecting the Canadian public with the virus of hate, this brief racist episode appears to have generated some degree of resistance in the Canadian body politic. Opinion-makers, religious, political and social leaders, and ordinary men and women, showed their sense of revulsion, and their determination that Canada shall not be a breeding ground for hatred. If this determination is not always as firm or as outspoken as it might be, it is sufficient to warrant a vote of confidence from the "target" groups in society, and to offer a basis for further development. Far from asserting any influence on the affairs of state, the hatemongers have had to endure the spectacle of seeing one of the authors of the report of the Special Committee become the Prime Minister of Canada, and another a member of the federal House of Commons. Far from attracting to themselves a growing number of militant supporters, the hatemongers have dwindled to an even more insignificant number than that detected by the special committee.

Should we not, then, learn the lessons of experience? The Canadian public can and should be trusted to vigorously resist attempts

to indoctrinate it in attitudes of hatred. Even in the face of serious national and international tensions, it has not succumbed to the appeals of those who would wish to exploit confusion and controversy.

But, it might be argued, it is possible that future circumstances might arise in Canadian society which would be more receptive to the spread of hatred, and at that point it will be too late to enact legislation. In this connection, an analogy is often made to the democratic Weimar republic, which was in the space of only a few years overthrown by the racist Nazi regime. To this point there are two responses.

First, Canada of 1969 can in no way be compared to Germany of 1919 or even 1929. We have not just come through a catastrophic war, a social and political revolution, an economic collapse, or a sudden class upheaval. We are not a country lacking in democratic traditions, new to parliamentary institutions, or beset by totalitarian subversives of the left and the right. In short, none of the conditions which produced the downfall of the Weimar republic and the rise of the Nazi party are, or are likely to be, present in Canada. In factual terms, any comparisons between these two countries, if intended to conjure up the spectacle of a Canadian Third Reich, must be dismissed out of hand.

Second, the whole notion of a "clear and present danger" test is that we should not be persuaded to surrender our freedom in order to make ourselves secure against dangers which may never come to pass. This seductive appeal of "it just might happen" would lead us down a path from which there is, logically, no turning back. For many people (although I do not believe their fear is justified) there is a "clear and present danger" that Canada will fall prey to American militarism, or to the terrorist tactics of certain separatist elements in Quebec. What extremist measures might not be justified in the eyes of these individuals in order to suppress the "danger" which they fear so much? In other words, it is my submission that the justification, if any, for legislation inhibiting freedom of speech (which this Bill is conceded to do) must be found in an objective state of facts, rather than in the subjective apprehensions of some parts of the community.

4. Criminal Legislation is an Ineffective and Inappropriate Method of Fighting Hate Propaganda

Assuming that this honourable committee rejects the arguments that I have made on the grounds of principle, and on the issue of proof, I should like to make a pragmatic analysis of why I feel penal legislation is the wrong way to attack hatemongering.

In the first place, by courting prosecution, and by using the trial as the means of gaining public attention, the hatemonger may in fact gain considerable advantage, even if he is ultimately convicted. As will be seen, certain features of the proposed bill afford the hatemonger an opportunity, publicly sanctioned, to conduct his defence by a further propagation of his perverted ideas. Moreover, conviction and imprisonment may well be sought and welcomed by the hatemonger, not merely because it confers upon him a spurious air of martyrdom, but as well because he is driven by dark compulsions which make him perceive himself as the victim of society and its values. In effect, then, far from diminishing the incidence of hatemongering, prosecution may actually increase it.

Second, as our experience with communism indicates, if we outlaw certain forms of speech, however distasteful, we may simply drive the speakers underground. Bolstered by the allure of the illicit and the comradeship of co-conspirators, the number of hatemongers might actually grow. On the other hand, there is something to be gained from permitting hatemongers to speak publicly. For some disturbed individuals, the opportunity to do so would afford a catharsis, and reduce any compulsion to engage in more serious and harmful acts. More importantly, the hatemongers would be identified, and would be subject to the constant scorn and ridicule of the general community, thus further discouraging them.

Third, while I concede that an effort has been made to draft the bill tightly, I share with many people the genuine fear that even in its present terms it may be used to silence individuals and groups whose cause might be either innocuous, or, indeed, highly meritorious, but whose methods are found to be distasteful by those who are in a position to initiate prosecution. To some extent the risk here highlighted will be developed in an analysis of the actual terms of the legislation. However, as a general matter it is true that Canadian courts have not been particularly sensitive towards free speech values. There is no reason to expect that the present bill will receive a more libertarian interpretation than

have other statutes designed for limited purposes, which have in fact been applied to inhibit free speech in Canada.

Fourth, it is a notorious article of any totalitarian faith that public order and social cohesion must override free speech and dissent. While I certainly do not suggest that those who favour this bill are in any sense of the word supporters of such a totalitarian attitude, it does strike me as being particularly ironic that we seek to protect liberty by diminishing it. We are, in effect, creating a precedent for repression, should an unhappy day ever arrive when less benevolent and liberal legislators occupy the benches of Parliament.

Finally, I come to the point, which, in my view, is more significant than any other. I believe that the use of criminal legislation to control activity which is deemed to be hurtful and anti-social rests upon a miscalculation about the efficacy of criminal law. To take but three examples, we were not able to diminish drunkenness by prohibiting the sale of alcoholic liquor; we have not been able to curb the use of narcotics by a vigorous campaign of policing; and we have not managed to stifle various manifestations of sexuality by censorship or the threat of criminal sanctions. We err when we concentrate our attention upon those who disseminate, rather than those who consume. If hate propaganda falls upon the ears of a hostile audience, it will have no effect. If it falls upon the ears of people who suffer social or economic deprivation, whose education in citizenship and democratic values is deficient, then it may well take root.

If the bill were merely destined to be ineffective, this might be reason enough to avoid enacting it. But there is actually, I believe, a risk that the passage of this criminal legislation may inhibit effective educational measures in the Canadian community.

If this bill is enacted, the general community reaction will be "now there is a law, and the business of combating hate propaganda is the job of policemen and magistrates". Not so. The job of combating hate propaganda is, and always must be, the job of every citizen. To enact a law is to invite the citizen to slough off his responsibilities, to hand over to his paid servants the moral burden which is his alone. I would prefer to see individual citizens—from the highest to the lowest—constantly confront and shout down the hate-monger and the bigot, rather than permit them to bask in the illusion that the forces of

law and order, by prosecuting a few sad individuals, have obliterated prejudice.

5. The Bill as Drafted Contains Serious Flaws

An article by Dean Walter Tarnopolsky of the Faculty of Law, University of Windsor, which was published in the University of British Columbia Law Review and which I do hope has been brought to the attention of this committee, traces a number of serious problems inherent in the language of the bill. I propose in this submission merely to highlight one or two of the points made by Dean Tarnopolsky, and perhaps to contribute one or two additional points.

I do not deal at length with Section 276A. By and large, advocacy or promotion of genocide is offensive because it involves the doing of violence to a group and its members, rather than the mere utterance of words which are distasteful to them. I would merely observe that such phrases as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction" might well be employed to describe even benevolent measures, such as those undertaken in relation to the resettlement of economically deprived communities, or integration of Indians or Eskimos into an urban society. Naturally, there will be some argument about the term "deliberately", but I think that much clarity could be added to the section if it were made clear that what is intended to be outlawed is the doing of physical harm to individuals, rather than dissolution of the group *per se*. I would also express some concern at the failure to define the nature of the "groups" being protected. While many absurd illustrations could be put, I merely make the point that Parliament should avoid creating serious crimes whose scope cannot really be anticipated.

Turning to Section 267B, my first concern is with subsection (1). There is a risk that a speaker might find himself in violation of the section by reason of his outspoken views, not because he desired violence, but because his audience did. This section, in effect, creates a "heckler's veto", so that those who object to the message given may not merely silence a speaker, but in fact may make him subject to prosecution, by their failure to behave. I therefore think that a clear line should be drawn between the speaker who has violence as his objective, and the speaker who is a victim of it. This distinction is critical for the protection of minority groups who appeal against real or imagined injustices visited

upon them by the majority. For example, one can easily envisage an Indian or Negro spokesman who denounces the white race in bitter and contemptuous terms which fall within the reach of section 267A, as a result of which he is attacked by an angry crowd of whites. Naturally, it is possible to take the lofty attitude that such minority group members should speak in polite and measured tones, in conformity to the standards laid down in the bill. But this rejoinder not only ignores the realities of political oratory and of the intensity of their grievance, but as well changes the rules in the middle of the game. At this moment in history when so many minority groups are, for the first time, asserting their claims to human dignity, we ought not suddenly to deny to them the luxuries of intemperate self-expression in which we have indulged ourselves for so long.

Subsection (2) is also open to serious objection. There is no limitation as to the time, place, or circumstance of the communications which are forbidden. Surely we do not wish to come to the point where casual conversation, or even formal communication, within the confines of a self-restricted group becomes a matter for regulation. If the criminal law has "no place in the bedrooms of the nation", it likewise has no place in its parlours, or even its meeting halls. The section, as drafted, invites snooping, an informer system, and ultimately an awareness by each citizen that words spoken by him may be reported to "Big Brother".

The defence afforded by subsection (3), which was apparently intended to preserve the libertarian credentials of the proponents of the bill, in my view does no such thing. Truth or falsity, or belief in truth and falsity, the two defences afforded, are virtually irrelevant to an evaluation of social, religious, or political controversy. Opinion, not fact, is the stuff of speeches. Subjectivity, not objectivity, is of the essence of response. If the medium is today conceded to have greater impact than the message, then it would follow that the right to resort to non-verbal, and even non-rational, communication may be more important than the right to be permitted to speak "truth". Moreover, as has been indicated, to frame a defence in the terms of this subsection is to invite the hatemonger to use the trial as the occasion for demonstrating his belief—which may be as genuine as it is irrational—that minority groups are guilty of some great offence against society, or deserving of some particular form of ill-treatment.

Yet, to deny the hatemonger this opportunity is to deny him even the minimal defence afforded by this bill. Thus, a trial under this provision might well turn into a circus of hate and a public exhibition of psychopathology.

Section 267c is an unusual attempt at censorship. It is potentially unfair both to the prosecution and to the accused. If the publisher of impugned material is a reputable person acting in good faith, then the fact that he is ultimately acquitted, perhaps after a lengthy trial and one or more appeals, is of little consequence; he will have been denied the opportunity to distribute his publication at the moment when he had counted upon doing so, perhaps as part of a regular publishing schedule. On the other hand, the unscrupulous publisher, if acquitted, is in a position to exploit prosecution as a device for luring readers; even if he is convicted, moreover, public curiosity may well be whetted, thus inviting clandestine circulation of material which may have escaped confiscation, or been reproduced elsewhere. "Banned in Boston" has become a by-word for the inefficacy of the procedure proposed in Section 267c.

Finally, I would draw the committee's attention, without superfluous comment, to such matters as the shifting of the onus from the Crown to the accused in section 267b, and the possible deprivation of a jury trial in an area of activity which historically has been the greatest concern of juries under the British system of justice.

6. What to do about Hate Propaganda?

If criminal legislation is undesirable and ineffective, and if the proposed bill has serious flaws, does it follow that nothing should be done about hate propaganda? No one could responsibly take this position.

It is undeniable that there exists a capacity for hate against individuals, against groups, against the "system," amongst all of us. Whether from some psychological disturbance, or from a fantasized or genuine awareness of injustice, all of us have the unhappy tendency to condemn, to ridicule, and even perhaps to harm other human beings by reason of their association with a group.

What I propose is that within the limits of our resources, we bend every effort towards eliminating real injustices, towards explaining and exploding fantasies, and towards stimulating respect for individuals and their

differences, and for the use of orderly processes for the resolution of grievances.

Under the federal citizenship power, it seems to me that the Government of Canada could, and should, undertake a vigorous program of public information and education. This program might take a variety of forms: speeches, declarations and proclamations by parliamentarians and public servants; a vigorously-administered federal Human Rights Code; co-operative programs involving churches, labour unions, employers, ethnic and service groups; promotion of exchanges in Canada and abroad, so that people from all walks of life can learn respect for the differing values of others; and—most difficult—eradication of poverty and cultural deprivation in many parts of the country.

All of these, especially the last, involve the long run rather than the short run. But we do have a short run because Canada is not now, nor is it likely soon to be, a fertile ground for the hatemonger. All of these, especially the last, involve the commitment of considerable human and financial resources. But we have these resources, and we are already committed, in substantial measure to the elimination of poverty and inequality. Whatever other motivations this program may have, it undoubtedly will help to eliminate the dangers at which this bill is aimed.

I do not believe that government can act alone or even act with greatest effect in this field. Much of what needs to be done must be done by private citizens. Acting in their own neighbourhoods, whether in an organized fashion, or in simple private discourse, individuals must undertake to confront and vanquish prejudice. But if government does nothing save amend the Criminal Code, it will have done nothing to stimulate this all-important activity by citizens. These amendments may simply recede into well-deserved obscurity, there to join the band of bigots whose conduct led to their enactment.

With respect, the yardstick by which Parliament's genuine concern for group relations in this country will be measured is the extent to which it proposes, and enacts, authentic measures to promote good citizenship and not the fervour with which it enacts conventional penal legislation to punish bad citizenship.

Thank you, Mr. Chairman.

The Chairman: Thank you, Professor Arthurs, for a very thoughtful presentation. Are there any questions from the senators?

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Senator Cook: Mr. Chairman, first of all I beg to congratulate Professor Arthurs. I take a different view from him but this is a very persuasive brief and it has shaken me considerably.

Speaking as one who has not had too much experience with the Canadian courts, professor, on page 9 you say:

However, as a general matter it is true that Canadian courts have not been particularly sensitive towards free speech values. There is no reason to expect that the present Bill will receive a more libertarian interpretation than have other statutes designed for limited purposes, which have in fact been applied to inhibit free speech in Canada.

That is to me an extraordinary paragraph or statement. Would you like to elaborate on that?

Professor Arthurs: Surely. During the decade from 1950 to 1960 the Canadian Supreme Court, particularly, went through I think what most legal scholars would say was a libertarian phase. There was a series of judgments, perhaps beginning with an important judgment by Mr. Justice Rand in relation to the law of sedition in which it was in effect held that the law of sedition applied to direct and overt subversion of the Government, rather than other anti-social acts.

There was a series of libertarian decisions during that decade. Prior to that time and subsequent to that time, as I will illustrate in a moment, the trend of decisions was quite otherwise.

Let me give you a few concrete examples. There was a case called *Regina v. Campbell* decided by Chief Justice McRuer who, as we all know, as a man wearing another hat now is Chairman of the Royal Commission on Civil Rights in Ontario. Certainly he has credentials which one would say were quite impeccable in terms of respect for free speech.

In the *Campbell* case, *Campbell*, a poet, committed the awful offence of speaking in a public park without a permit. The argument was put to the learned chief justice first of all that indeed it was not only without a permit but in contravention of a total ban on speech in a public park. The argument was advanced and rejected that a municipality had no such power to prohibit speech in a public park. It was dismissed summarily by the chief justice and the decision confirmed by the Court of Appeal.

To take another example: recently in the Province of New Brunswick—I think I can speak about this case because it is no longer *sub judice*—a young and foolish student made a derogatory comment about the administration of justice in that province, admittedly foolish and derogatory. It was found necessary to haul that young man before the court and sentence him to ten days in jail under the law of criminal contempt.

Now, I can say in all candour I must disclose that the Civil Liberties Association defended him, and as an officer of the association I was involved in this controversy.

I think the point was not whether he was right or wrong; the point was not even whether the court was right or wrong. The point was that the court really did exhibit very little interest in the argument, no interest, to the point of virtually summary conviction, that people have the right to be wrong; they have the right to say rude things. Of course, as you know, the contempt power is unconfined by any provision of the criminal code. This was used quite without compunction to put this young man in jail for ten days.

I could multiply these illustrations back and forth across the country. I may say in all fairness that the Supreme Court of Canada has been somewhat kinder towards libertarian values than many of the provincial courts, but we could catalogue a good many of these cases which are not so clearly right or clearly wrong. We could say that on legal grounds the decision had to be otherwise, but they were borderline cases in which the court, with respect, seems to fall off always on that side of the fence which is contrary to the free speech value.

Senator Walker: What section of the code is that to which you refer about the young man?

Professor Arthurs: He was not charged under any section of the code. Unfortunately, from my point of view, it was just contempt of court with the summary power of conviction.

The Chairman: You would not abolish the rule with regard to contempt of court expressed in speeches or otherwise, would you?

Professor Arthurs: The English courts have developed a law of contempt that says basically this, that the reputé of the courts is sufficiently well established in the community that if one does no more than comment

adversely, however adversely and however intemperately, on the court's administration of justice, then that is not contempt. We no longer need the law of contempt to ensure the survival of the court's reputé. If, on the other hand, the contempt is of such a type as to disrupt the administration of justice, that is by carrying on in the court room or interfering with the execution of the court order, then that, of course, is probably subject to the law of contempt.

The Chairman: You would not stand for free speech in that regard would you?

Professor Arthurs: Certainly not. One could not permit disruption of proceedings.

Senator Croll: Was the contempt charge in New Brunswick not exactly what you describe as something less than mere opinion?

Professor Arthurs: No. The young man in question, sir, wrote an article in the student newspaper.

Senator Croll: Yes.

Professor Arthurs: In which he said that the courts of New Brunswick were identified with a certain ruling leader in New Brunswick.

Senator Croll: No. He went a lot further than that. I remember reading the article.

Professor Arthurs: In any event, I think you will agree with me that it was an article appearing in a newspaper. There was no thought of standing up in a court room; there was no interference with the process of the court. It was certainly an attack on the court, an intemperate and foolish attack on the court, but there was no interference with process.

Senator Choquette: There was the famous case of the Witnesses of Jehovah that went to the Supreme Court of Canada. Again it was a terrible article in pamphlet form, "Quebec's Burning Hate." Again the Supreme Court of Canada in that case said that it did not infringe upon freedom of speech.

Professor Arthurs: Actually, senator, if we are thinking of the same case, that was one of those cases in the fifties in which the Supreme Court did take the other position, the libertarian position, but certainly in the lower courts the Quebec courts did not.

The Chairman: How do you distinguish, professor, between the present bill, which would ban hate propaganda as against groups, and libel or slander as against individuals? Would you abolish the rules of libel and slander because they interfere with free speech?

Professor Arthurs: I would like to make several responses to that, Mr. Chairman. In the first place I would certainly abolish the criminal code provisions as opposed to the tort division relating to defamation. I would unequivocally say that it is no business of the State to regulate the private relationships between people in that fashion.

Now, recently the United States Supreme Court evolved a doctrine beginning with a case called *New York Times v. Sullivan* in which the *New York Times* was sued for one million dollars by a sheriff in a county in Virginia because it published a paid advertisement, signed by a group of New York citizens, condemning that local sheriff for mistreatment of civil rights demonstrators. It apparently made certain false allegations against him, and the newspaper was sued civilly for libel.

The judgment, of course, was recovered, as one might expect in the Virginia court, and the case found its way ultimately to the Supreme Court in the United States, which articulated the doctrine that libel without notice of a public official is not actionable.

Now, how did they define malice? Malice is the wilful misstatement of facts known by the speaker to be true. Even careless misstatement is conceded to be part of the risk of public debate, that with great controversial publications even exposure to unfavourable and occasionally untrue statements is part of the risks of the game.

I am sure someone will immediately draw my attention to a case which has often been cited in the course of your proceedings and in submissions to you, the case of *Beauharnais* in Illinois, in which in 1951 the United States Supreme Court sustained an Illinois statute of the same general character as that now before you.

I have discussed this at length with a number of American constitutional experts and it is their unanimous opinion as expressed to me, admittedly in informal conversation, that the *Beauharnais* case would not be followed today. It was in fact a product of a peculiar moment of the court's history in the early times which, as you will recall, was called

the McCarthyite period during which the libertarian attitude of the courts had diminished very considerably.

There are a number of cases, of which the *New York Times v. Sullivan* is only one, but there are a number of other leading cases which leave the unanimous feeling that the *Beauharnais* case was just a freak and really has no chance whatsoever of being followed in the United States Supreme Court today.

So that for all of those reasons I would say that an individual criminal libel law is an invidious thing. It involves the State on the side of one party to a controversy. Particularly in this context it does not do anything to recompense the target of the libel for any actual harm suffered by him and yet it does, as I say, mobilize the course of power.

The Chairman: Of course that has to involve the element of the disturbance of the public peace. It is not criminal libel unless it does; is that not right?

Professor Arthurs: I am not so sure that is right. My understanding from the Cohen Committee's legal analysis is that their proposals—and I believe the proposals now before you—would not require that element. Certainly Section 267B does not require it.

The Chairman: No, I was talking about criminal libel, the present law of criminal libel.

Professor Arthurs: I do not believe that to be true but I could be wrong, senator. I would be happy to stand corrected on that.

The Chairman: No, I am not correcting you on points of law.

Professor Arthurs: No, but I always respect the opinions of my seniors at the bar, sir; I could well be wrong.

Senator Walker: On page 13, Mr. Dean, the penultimate paragraph:

If the criminal law has "no place in the bedrooms of the nation", it likewise has no place in its parlours, or even its meeting halls.

I take it from that that you mean if the amendments to the Criminal Code, which are coming over here shortly, legalizing abortion and homosexuality, if we are getting so free in our interpretation of our freedoms that we allow that sort of thing and yet in the hate Bill for simply matters of speech we condemn, it is a paradox is it not?

Professor Arthurs: It is to me, Senator Walker.

Senator Walker: That is what you have in mind, is it not?

Professor Arthurs: Yes.

Senator Walker: I think it is shocking.

Professor Arthurs: If I might make that just a little clearer: If one looks at section 267B, subsection (3), the defences section, there is to me a grave anomaly in that the communication, as I have indicated, which is an offence under subsection (2), is not limited by time, place or circumstance. That is, one person sitting in a living room saying some very distasteful thing to another which incites hatred against a group within the definition section may well find himself charged and, indeed, convicted under that section unless he could bring himself within subsection (3), the defences section.

Senator Walker: Quite so.

Professor Arthurs: Subsection (3)(b) provides that he may escape conviction if he establishes that his statements were relevant to any subject of public interest, the public discussion of which was for the public benefit, and that on reasonable grounds he believed them to be true.

Now, here we have just convicted a man for speaking privately, yet we require him to establish that public discussion of those matters is for the public benefit in order to escape conviction. So that, anomalously, the man who speaks publicly in this way is in a better position to claim this defence than the man who speaks privately.

If the sponsors of the bill do genuinely feel—and I believe their belief is genuine—that certain kinds of public discussion may leave a residue of hatred which cannot be erased, and if in effect I were to lose the argument here, I would at least ask that some attempt be made to confine regulation to the public forum and not to the private forum, conceding the difficulty of drawing the line of hate, just for the reason that you have put.

Senator Cook: Has similar legislation not been passed in other countries?

Professor Arthurs: I think that is a fair point. I think almost all of the countries which have passed legislation of that sort are in Europe or in continents outside North America, outside the Anglo-American system

of jurisprudence. Those countries have had a totally different social experience than we have had. Group relations, for example, in France, in Germany and in Italy cannot in any sense be compared.

Senator Cook: The United Kingdom?

Professor Arthurs: I think the United Kingdom is a fair case. Let us look at the United Kingdom today. The United Kingdom, as we all know from reading the newspapers, is in a fearful state at the moment because, first of all, I suppose they are paying the price for an excess of liberality, if one wants to put it that way, for being colour blind for so long. In fact they deliberately closed their minds to what many people urged was a growing problem. One could not admit the existence of the problem and take remedial measures, educational measures, without conceding that some part of the British public was bigoted.

I spoke to a young man the other day, a colleague of mine, Jeffrey L. Jowell, who has written extensively and researched extensively the British legislation. He tells me that the implementation of anti-discrimination legislation in England was long delayed because of the unwillingness of the government of the day to recognize that the situation was such as it happened to be, that such a problem could exist in their fair land.

I am not suggesting that we adopt that ostrich-like posture. Quite the contrary, I suggest that we confront that very directly and do something effective about it. That is one point I would make.

Secondly, Britain of course is a country that was, for example, in the late thirties in effect under siege. When the first legislation was passed regulating the wearing of uniforms, military drilling, various antecedents of the present racial relations which were used to attack people like Colin Jordan, the British nazi—that legislation was applied in the late thirties when a totally different situation was then confronting them.

It would be my submission that the country to which we are most to look for guidance is that of our friends south of the border, with whom we do in fact share many economic and social ties, whose newspapers we read and who as we see, for better or for worse, stimulate concerns here which exist there.

Now, I say if the United States has preserved its nerve to the point where no one there, including, I may say, the American Jewish Congress, is advocating legislation of

the type here being advocated, if they can preserve their nerve in the face of the intense social upheaval and racial upheaval that is going on in that country, then we can surely preserve ours, at the same time striking in a meaningful, sensible way at the possibility that there might be some seeds of this, and eradicating them.

Senator Cook: What did you say about the American Jewish Congress?

Professor Arthurs: It has not sought this kind of legislation.

Senator Walker: Is it correct to say that not one American State has enacted such legislation?

Professor Arthurs: To my knowledge, senator, the only one would be Illinois, whose statute was tested and, as I indicated, sustained in the 1951 United States decision. Now, I truly believe that that would not be sustained today given the court's subsequent jurisprudential development.

Senator Walker: Even in New York, where there are two-and-a-half million Jews, New York State refused such legislation?

Professor Arthurs: I do not know that they refused it, sir; I only know that they do not have it on the books.

Senator Croll: Do I understand you that only Jews want this legislation?

Professor Arthurs: By no means, sir.

Senator Croll: That is what you have been saying for about ten minutes.

Professor Arthurs: I would like to make my position clear.

Senator Croll: Make it very clear.

Professor Arthurs: I would like to make it unequivocally clear that there are many people who are neither Jews, nor Indians, nor Negroes, nor adherents to any minority group, who for reasons I think of compassion or concern for democratic values, are amongst the foremost advocates of it.

I make no bones about it. I said in my opening statement that I respect their sincerity and I respect their intention. There is no self-interest in their position, but I say to you that the mere fact that they take that position in good faith is not enough in itself reason for adhering to that position. I think one must test it.

Senator Choquette: Professor, very little has been said so far about the easiness with which literature can be seized. I am going to ask you this question. Do you not think that it should be made much stricter? That is, that the attorney general in every case should give instructions to the local crown attorney to seize that literature, rather than require that an individual who feels that a group has been insulted or aggrieved go with an affidavit to a local judge and obtain an order for seizure?

Professor Arthurs: I think this much is true, if I can formulate a kind of broad proposition: The further you get away from a local and perhaps homogeneous community which feels strongly about a particular issue, the greater chance there is that there will be a level head prevailing.

In my view, for example, many of the worst offences against civil liberties do take place at the local level and, as one ascends in terms of having a larger group and in terms of a bigger set of values, the chances are that the broad constituency will say, "Now hold on a moment, let us not rush too fast."

So, I would say certainly I would feel happier, if the bill did pass, to know that the provincial attorney general or the federal minister of justice at least had to give his consent to prosecution, as indeed we already have in many statutes, such as The Combines Act where we have a very elaborate procedure, for example, for deciding whether or not to initiate prosecution or, by definition, seizure.

Senator Walker: Mr. Dean, there is one point that worries me and I am going to ask you whether we should have something in this bill to curb it. I refer to the terrible gramophone record conversations on the Bell Telephone. If you call a certain number you hear the most defamatory language. I think Beattie was behind it and he will not be doing it for a little while. What can be done to correct that? You know what I am referring to do you?

Professor Arthurs: Yes, I am familiar with it.

Senator Walker: You are encouraged to dial a number and as soon as you dial the number you get this awful message; this is demagoguery and I do think that something should be done to cut it out. We had a vice president of the Bell Telephone Company who claimed that his company finds it impossible under its charter to refuse such a person.

Professor Arthurs: Of course, I express the same concern as you do; I feel it deeply. Perhaps one can take some comfort in the fact that the message is only heard by those who seek it. I suppose there is that, but to say to Bell, not to any public official, "You shall be the judge of what is conveyed over your wires and over your equipment" is to me to put too much power in the hands of Bell.

If we are to stop it, if we are to use the coercive power of law to stop it, then I would prefer to see it done by regular processes of law and not by allowing Bell to pick and choose who shall and who shall not have access to its facilities.

So I would say that if you are determined to put a stop to it, use the bill, prosecute it, seize it if you must, but do not give that power to a private corporation.

The Chairman: Thank you, Professor Arthurs, you have given us a very thoughtful presentation. I am sure I can express this as the opinion of the entire committee. We are grateful to you for having come to Ottawa to make this presentation.

Professor Arthurs: Thank you very much, sir.

The Chairman: Honourable senators, the last item on our agenda is a presentation by the Manitoba Human Rights Association, represented by Mr. Melvin Fenson, Mr. Walter Hlady, and Mr. G. Martin. If you gentlemen will come forward we shall be very pleased indeed to hear your presentation.

Mr. Glenn E. Martin, Manitoba Human Rights Association: Mr. Chairman, honourable senators, I have been asked to lead off on this brief, which the honourable senators have before them together with copies of the exhibits. I am wondering, Mr. Chairman, if I could give you the originals of these exhibits to be passed among the members of the committee?

Senator Walker: I think we have them, have we not?

Mr. Martin: You have copies only, Senator Walker. These might be of interest to the committee because these are the original documents.

The Chairman: We will take it that your copies are true copies.

Senator Walker: I vouch for Mr. Martin making true copies.

Mr. Martin: First of all, I am very pleased to be with you today. I am purposely going to skip portions of this brief so that we can get down to the meat of the situation. It is before you and I will try to cover as much as I can. *(Exhibits referred to in the following brief, filed with the Committee)*

The Manitoba Human Rights Association appreciates the opportunity to renew its representations on this vital problem. In this brief we shall demonstrate that hate propaganda is being distributed in Western Canada among various ethnic and religious groups and we will cite examples of published materials and public statements which may reasonably be regarded as fomenting contempt and hatred of Jews and Catholics, Negroes, Doukhobors and native Indians. The information contained in the brief of February, 1968, (Exhibit "A") is still valid insofar as it gave evidence of activities under various categories of hate propaganda in Winnipeg and Western Canada.

Swastikas and anti-Semitic Slogans [visible representations]:

In our 1968 brief, pp 2 to 4, we cited 15 examples of the painting of swastikas and anti-Semitic and nazi slogans on synagogues, schools, homes, places of business and the Manitoba Legislative Building between April, 1966 and February, 1968 (Exhibit "A"). We suggested that these incidents come within the terms of Section 267 (b) Subsection 1 of the proposed legislation and under the definition of subsection 5 (c) which declares: " 'State-ments' includes words either spoken or written, gestures, signs or other visible representations." We suggest that swastikas and anti-Semitic or nazi-like slogans painted on walls are visible representations which could cause "incitement. . .likely to lead to a breach of the peace".

Distribution of Hate Propaganda:

Several incidents of distribution of hate propaganda related to Section 267(b) Subsection 2 of the proposed legislation were recorded in the 1968 brief. (pp. 4, 5, Exhibit "A") Some of this material came from sources cited in the report of the Department of Justice on Hate Propaganda in Canada published in 1966. One of these items was a tract, originating in Minneapolis, Minn., and preaching hatred of the Roman Catholics (Exhibit "A",

p. 4 and copy of tract attached to Exhibit "A").

A significant incident reported in the 1968 brief (Exhibit "A" p. 5) involved the arrest of two men in Winnipeg who were found to be carrying membership cards in the Canadian Nazi Party, and had a quantity of anti-Jewish and anti-Negro literature in their rooms. These men were convicted of vagrancy, given six months suspended sentence and 24 hours to leave Winnipeg. This incident took place in July, 1967. The Winnipeg Tribune commented editorially, (July 14, 1967) that the magistrate did the best he could as there is no law against hate literature, and added the following pertinent remarks:

Unfortunately the decision may be misinterpreted as sending the pair to go peddle their hate elsewhere, but not in Winnipeg. This is not the court's fault. It's Ottawa's. The court could not take into account conduct, however repugnant, against which no charge could be laid. For a quarter of a century Parliament has been vacillating on this subject of organized hate-mongering. It has provided no guidance for the police or the courts. Until it makes up its mind one can only hope the hate merchants keep falling foul of vagrancy ordinances and municipal bylaws." (attached to Exhibit "A")

Additional Examples of Hate Propaganda in Western Canada:

(1) In the week of March 17th, 1969, two examples of continued distribution of hate propaganda came to our attention. In the first instance three anti-Semitic leaflets were received by "Healthful Living Digest", a Winnipeg publication. These leaflets (Exhibit "B") came from Sweden in an envelope postmarked February 24th, 1969, and listing the sender, Einar Aberg, another of the disseminators of hate propaganda named in the 1966 Report of the Special Committee on Hate Propaganda in Canada. The three leaflets enclosed in this envelope were as follows:

1. The Real War Criminals (dated 1969)
2. Behind Communism stands—the Jew (undated)
3. Whose is the Hidden Hand? (dated 1958)

Einar Aberg is listed as the editor of all three of these leaflets, which quote from other sources including the Canadian Intelligence Service, Flesherton, Ont., Canada.

(2) Gene Telpner, A Winnipeg Tribune columnist, reported on Thursday, March 20th, 1969 (Exhibit "C") that someone has been busy distributing U.S. nazi party handbills to Metro Winnipeg homes. Subsequent to the publication of this item in his column Mr. Telpner received an unsigned letter dated April 2, 1969 (See Exhibit "C") addressing him as a "Zionist swine", attacking him for publishing the item in question, and repeating many of the statements which would obviously come under the heading of "group defamation" under the definition of the proposed legislation. Mr. Telpner has reported to our committee that he receives crank letters, most of them unsigned, at least once a week and about one of every three includes anti-Semitic references. Only once in the past six months did he receive a letter of this type which carried a signature.

(3) Early in 1967 Col. A. L. Brady, the Commander of the Saskatchewan District of the Canadian Armed Forces in Regina, received an anti-Semitic letter from France over the name of George Ross Ridge, written in French. The first two sentences of this letter (Exhibit "D") state:

En ma qualite' de professeur d'universite' americain actuellement en exil, j'ai le devoir d'attirer votre attention sur la conspiration juive internationale.

Aux États-Unis la conspiration est dirigée par J. Edgar Hoover du F.B.I., avec l'appui des terroristes juifs du B'nai B'rith.

(English Translation)

In my capacity as an American university professor in exile I feel obligated to draw your attention to the Jewish international conspiracy.

In the United States this conspiracy is directed by J. Edgar Hoover of the F.B.I. with the support of the terrorist Jews of the B'nai B'rith...

It is hardly necessary to interpret or elaborate on the views of Mr. George Ross Ridge, nor for that matter, on those of the other disseminators of racist propaganda cited to this point. (Exhibit "D" attached) The Human Rights Association feels that anti-Semitic and racist propaganda of this type, no matter how ridiculous and unbelievable it may appear to enlightened individuals, continues to have a dangerous effect among unenlightened and ill-informed sections of the population. It is particularly dangerous when it influences the minds of children.

A proprietor of a small store in Winnipeg has reported having difficulties with some of the children in his neighbourhood. (Confidential Exhibit "E"). In February, 1969, some of these youngsters, ages 11 and 12, have handed him a series of obscene notes containing anti-Semitic epithets among other things, which they obviously wrote themselves. This is cited as one example of the extent to which anti-Semitic and racist poison can and does penetrate. (Exhibit "E" is marked 'confidential' because this case is still under study).

Another example of a hate letter sent through the mail, which probably comes from a child or a young person, is included with Exhibit "E". This tends to confirm that the "swastika" is recognized as a symbol of hatred and a warning of death.

With further regard to the swastika symbol (also found in the photographs of the daubings on synagogues and other buildings, in Exhibit "A", and on the leaflet of the National Socialist White People's Party, in Exhibit "C") we have evidence that the swastika is used by such groups as the Parti National Socialiste of Levis Que., and by a group called Hell's Rejects of Brownsburg, Que. Both groups tried to order swastika crests in Winnipeg (Confidential Appendix "F")

Fomenting Hatred Among Ethnic Groups:

Just before Christmas, 1968, a Ukrainian language leaflet slandering Prof. J. B. Rudnyckyj, Head of the Slavic Studies Department at the University of Manitoba and a member of the B. & B. Commission, was distributed in Winnipeg. (Exhibit "G"). We are aware that the proposed Bill S-21 is not intended to protect individuals who are already protected under the slander and libel provisions in the criminal code. However, a brief excerpt from this leaflet will suffice to show that there is a connection between an attack on an individual and group defamation. The excerpt in translation is as follows:

Rudnyckyj went to Israel to find there his own people. He bought there a piece of land and hoisted a flag with the star of David. Is this not a scandal and a shame? Jaraslav's old Gods are all with Jewish long curls. He and his friends in Jerusalem are planning an all world government in Israel. He will be very happy when strolling on his property in the morning he will see everywhere his friends all circumcized.

This Ukrainian language leaflet may be seen not merely as an attack upon Prof. Rudnyckyj, but also as an effort to foment hatred of the Jews among the Ukrainians.

Another example of the fomenting of hatred among ethnic groups recently came to our attention from Vancouver. A leaflet has been circulated in B.C. headed "Intimation to Sons of Freedom and Other Doukhobors". (Exhibit "H"). This brochure declares that there is no longer a government in Canada "but a pitiful obedient humiliated group of lackies, who perform and execute the orders of SUPER GOVERNMENT—JEWS THE ZIONISTS".

This leaflet is signed by one James Malcolm Smith and blames Zionist agents for all the troubles of the Sons of Freedom.

The attack against Prof. Rudnyckyj cited in Exhibit "G", and the incitement directed towards the Doukhobors in Exhibit "H", are two examples of the manner in which the so-called "World Jewish Plot" is adapted to the Canadian scene. This idea comes from "The Protocols of Zion" which is regarded as the most infamous forgery in world history.

For the past five or six years Eric Butler, an Australian and self-styled authority on world affairs, has been touring Canada, lecturing under the auspices of the "Christian Action Movement", and more recently using the name "Canadian League of Rights".

Eric Butler wrote a book shortly after the second World War entitled *The International Jew—The Truth about the Protocols of Zion*. The title-page of this book (Exhibit "J") does not list a publisher and it is undated. There is however a sticker attached to the title-page listing the name and address of the "New Times Specialty Book Service" of Melbourne, Australia. The New Times is Butler's publication.

A 32-page reprint from Butler's book was reported to be in circulation in 1965 from British Columbia and from the State of Washington. A copy of this same reprint turned up last week in Winnipeg (Exhibit "J") with a Vancouver postmark but no return address. At the bottom of the last page of this book p. 166 (Exhibit "J") there is an unusual disclaimer from the printer as follows:

In printing this work on behalf of Mr. E. D. Butler, the printers, R. M. Osborne Limited, of 95 Currie St., Adelaide, desire it to be known that the views expressed therein are those of the author

and do not necessarily represent their views.

In the book Butler asserts that the use made by Hitler of the Protocols of Zion is proof of their validity. In his introduction he states:

It is quite beyond dispute that the central core of international finance is controlled by Jews (page 3, Exhibit "J")

A little further on Butler adds:

It is essential that we refuse to allow the alleged 'anti-semitism' of Hitler and his associates to color our investigation of 'The Protocols'...

...Hitler's policy was a Jewish policy; it helped to further the declared aims of International Jewry..." (Exhibit "J" p.4)

In April, 1968, when Eric Butler came to Winnipeg as the spokesman of the "Canadian League of Rights" the Manitoba Human Rights Association publicized Butler's racist background to organizations which had invited him to speak. The announced topics of his public lectures in Winnipeg included Viet Nam, Rhodesia and "Saving the Commonwealth". Butler uses these innocuous topics to develop an audience who may later be interested in the more injurious aspects of his racist and anti-Semitic philosophy. A copy of the letter on Butler's background issued by the Manitoba Human Rights Association in 1968 is attached to this brief. (Exhibit "I") Also attached are pages from Butler's book on The International Jew (Exhibit "J") which corroborate the quotations included in the letter.

Butler was interviewed on a C.B.C. Winnipeg Public Affairs program, "The View From Here", Thursday, April 11, 1968. The following exchange took place with one of the interviewers, Prof. Jack Stevenson, Philosophy Dept., University of Manitoba:

Stevenson: I would like to bring up the statement made by yourself in New Times Journal relating to the Jewish people. I have here a quote from you "Ever since their active participation in the crucifixion of Christ the Jewish leaders have worked ceaselessly to undermine and destroy the Christian faith. They...still...believe that the Jewish leaders are destined to rule the world".

Butler: That is correct. I wrote that 20 odd years ago. I am not repudiating or apologizing but I have got to explain that statement in the context in which it is

made. May I ask you a question, are the Jews a race?

Stevenson: The Jews are a people.

Butler: What's the difference between a race and a people?

Stevenson: All speaking at once, and Mr. Stevenson insisting that Butler answer the question.

Butler: I agree that I wrote that, and I don't repudiate it, but when I speak about Jewish people—I can develop that.

A little later on in the interview there was a further question and answer exchange as follows:

Stevenson: Did you write a book entitled "The International Jew—The Truth about the Protocols of Zion"?

Butler: Yes.

Stevenson: Do you stand by the views expressed in that book?

Butler: Those views were expressed 20 years ago. I have continually pointed out, as I hope every scholar does—

Stevenson: You are a scholar?

Butler: Well, I try to be one. In that book, and I said so 20 years ago there was a fact and I have pointed this out.

Senator Choquette: Where is Flesherton, near Toronto?

Senator Walker: It is down near Sarnia.

Mr. Martin: The brief continues:

Spreading of Contempt against Negroes:

The Canadian Intelligence Service published at Flesherton, Ontario promotes racist propaganda directed against the Negroes. The January, 1969 edition published a paper "The Creation and Exploitation of Race Myths", delivered by the same Eric D. Butler, at a seminar in Toronto last August sponsored by the "Canadian League of Rights" on the topic Race and Revolution". (Exhibit "M")

Eric Butler seeks to develop a pseudo-scientific rationale for the kind of color prejudice which has led to serious racial discrimination against Negro and black people in other countries and can only help to reinforce prejudiced attitudes in our own country, thereby fomenting contempt and hatred for our own coloured minorities.

It is important to cite the views of a British scientist, Dr. David Stafford-Clark, a consultant physician in psychological medicine to a number of leading hospitals in England and

to the Institute of Psychiatry at the University of London. In a paper presented in 1965 at a British Conference on Immigration (Conference on "Immigrant or Citizen?" by the National Committee for Immigrants, at Leicester, September 17 to 19, 1965) Dr. Clark made some very pertinent comments about the causes and effects of prejudice. Here is what he said:

Prejudice is so important that if we do not deal with it, it will deal effectively with all of us. Prejudice injects into our attitude towards other people, towards other causes, or other ideas, a fear which can become terror, a hostility which can become hatred, an injustice which can become unendurable.

It is always true that prejudice between people depends upon their capacity to perceive some kind of difference between themselves and others. Colour of the skin is such an obvious difference that it is not surprising that it can lead to the crudest kind of prejudice—both ways. Nevertheless, it is true that biologically the human race is all one species, although the divisions within that species are part of the variety and, I would say, the beauty of human diversity.

Obviously there are differences of culture, of education, of background and of language, just as there are differences of climate, custom and tradition. But these are less important than the recognition that all races are endowed in basically similar amounts with all the vices, virtues, hopes, fears and regrettably with that self-centredness which no human being can escape because it is part of the human condition.

Cruelty and bestiality in the way human beings treat each other are not always confined to those who have the upperhand, for we are all in this and we are all to blame. To make racial prejudice the basis of a philosophy, or to pervert it into a foundation for a religious belief, is to commit yet one more atrocious, terrible tragic crime against all the standards that men between them have ever managed to erect.

When we call for the adoption of Bill S-21 we look upon it as one important measure to stop the spread of hatred and contempt in our country which can result in cruelty and bestiality towards identifiable groups on the

ground of race, colour or religion. We are also painfully aware that racial and religious discrimination can and does lead to atrocious crimes by man against man. This strengthens our conviction that the provision regarding genocide in Bill S-21 is justified.

Mr. Walter Hlady, Manitoba Human Rights Association: Mr. Chairman, I will continue with the brief from this point.

Attitude to Native Indians:

In a study of the Canadian History textbooks used in Manitoba schools, undertaken in 1964 by the Community Welfare Planning Council of Winnipeg, it was reported that five textbooks selected for the study showed great improvement in treatment accorded to Indian people over the books of a generation ago. It disclosed, however, that there were still startling errors of omission, as well as of commission, and cited attitudes of contempt towards ancient Indian religious beliefs and customs.

Some significant quotations from the Manitoba textbooks deserve our consideration.

According to Aileen Garland, author of the Canadian history text "Canada, Then and Now" (MacMillan of Canada, 1956), Jacques Cartier is alleged to have written about the Indians he met on the Gaspé Peninsula as follows:

They can with truth be called savages, as there are no people poorer than these in the world. I believe they do not possess anything to the value of 5 pennies... they are great thieves and will steal all they can—*Canada, Then and Now*, page 3.

Senator Choquette: Something similar to that was written about the French Canadians by Durham.

The Chairman: Jacques Cartier wrote a lot of bunk when he got back to France.

Mr. Hlady: (Continuing to read) In another history text, "The Canadian Pageant", by G. J. Reeve (former principal of St. John's Technical High School, Winnipeg) and R. O. MacFarlane (formerly with the History Department of the University of Manitoba) comments about the Indians are as follows: (Canadian Pageant, pp20, 21, Clarke, Irwin and Co. Ltd. 1951)

It is possible that all the American Indian tribes in the course of their wanderings lived for some generations in the

frozen wastes of Alaska...this experience...deadened their minds; it killed their imagination and initiative...

By reason of his historical background the Indian was wholly unfit to cope with the more civilized, more intelligent white man.

The founder of New France, Samuel de Champlain, is quoted as saying that Indians live "like brute beasts (p. 45 in High School text "Canada—a Nation" by A. R. M. Lower and J. W. Chafe, Longmans, Green and Co., 1948 with numerous reprints until 1961).

According to Lower and Chafe the Indians were "poor savages" (p. 60) and their "conception of the supernatural was that of cruel and evil spirits" (p. 48). Moreover "the Indians' ideas of right and wrong were very different from those of Europeans. To torture an enemy was right; to show mercy was, if not wrong, at least weak..." (p. 48). And the Iroquois are described as "fiendish invaders" (p. 52) and "bloodthirsty savages" (p. 53).

The textbooks study report on the Indians prepared by the Community Welfare Planning Council of Winnipeg was presented to the Curriculum Revision Committee of the Manitoba Department of Education in 1964. We are aware that changes in the Manitoba textbooks are in the process of being introduced. To date however these changes have only been completed for grade III, and some of the texts with the offending material cited are still in use in our schools.

I should put in an aside here that I was a member of that curriculum committee on grade III. It took us about three years of work to introduce a fair and equitable Indian content in the grade III social studies course.

The Chairman: Your complaint about this statement about the Indians is that they are applying the criticism that might have been justified two hundred years ago against the Indians to the Indian of today, is that not it?

Mr. Hlady: Yes, because this is what our children are learning in the schools.

Senator Walker: Are you suggesting that Bill S-21 is necessary to eradicate that?

Mr. Hlady: No; may I finish this and go a little further?

Senator Walker: I would just like to know what you are driving at, that is all. We have under consideration this Bill S-21.

Mr. Hlady: This is one of the dilemmas that faced our association in developing this brief. We wanted to point out basically that there is a lot in our textbooks that promotes this sort of attitude and it needs to be corrected, and yet it basically cannot be called hate literature in the sense of the bill.

Senator Walker: Why bring it up? That is not part of it. Why do we worry about what is in the textbooks about what Jacques Cartier said, or what some other wild goose said?

The Chairman: We have not heard the entire brief; let us proceed.

Mr. Hlady: (Continuing to read) Canadians must face up to the fact that we continue to promote contempt, if not outright hatred, of the native Indians. We would like to cite a recent example of a public statement in this category.

Early in February of this year the *Public Eye*, a public affairs program of the C.B.C. Television network, presented a discussion of the problems of Manitoba Indians. One of the people interviewed was Winnipeg Magistrate Isaac Rice, whose statement (*Free Press* Clipping Exhibit "L") contained the following remarks: "There is something in their blood—I don't know what it is—but an Indian and alcohol just don't mix".

The magistrate also stated "I have never come across a married Indian couple".

At about the same time an interview with Magistrate Rice was published in the *Manitoban*, the University of Manitoba student newspaper (February 14, 1969, See Exhibit "L"). Discussing the causes and treatment of crime, and particularly the role of liquor as a cause of crime, Magistrate Rice is reported to have expressed the feeling that the Indians are amongst the worst offenders. He is quoted in the student newspaper as saying "There is something about the Indian constitution that makes them unfit to drink liquor".

After these remarks were made by the magistrate the Manitoba Indian Brotherhood announced that it would take legal action to prevent him from sitting in judgment in the case of any accused Indian (See Exhibit "L"). According to Paul Walsh, legal counsel for the Indian Brotherhood, the aim of this action would be "to prove that Magistrate Rice did in fact issue defamatory statements against Indian people..." The Indian Brotherhood has also launched legal action against the CBC and the *Manitoban* to prevent them

from making further use of the offending statements.

We cannot state definitely that the statements complained of would be actionable under Bill S-21, but they certainly appear to be of a kind to incite contempt against the native Indian people. Mr. David Courchene, the President of the Indian Brotherhood, has reported that the television program in question resulted in adverse reaction against the Indian people in Winnipeg. He cited as an example that the help given Indian students by the St. James Anglican Church in finding places for them in the suburban homes of white families, had been suspended.

The attitudes of contempt towards the Indians which concern us today may be traced back to the coming of the first Europeans who described the Indians as "heathen" and as "savages". The prejudices which developed centuries ago are still encountered, not in what we recognize as "hate propaganda" tracts, but rather in history text books as we have pointed out. Indian representatives on the Manitoba Human Rights Association support this brief because they believe that all ethnic groups should be protected against group defamation. It should not be necessary to invoke the law as proposed in Bill S-21 to protect the Indians from the effects of century-old prejudices. It is hoped, however, in the case of the Indians, that the adoption of this legislation will have a salutary effect on those who are concerned with the improvement of our history textbooks.

Senator Walker: You are not suggesting that such a bill is necessary to improve and have a salutary effect on the people who are producing the textbooks? Is the development of Canada and our attitudes not doing that at the present time?

Mr. Hlady: I would think so, sir, but I believe at the same time that legislation of this kind will also have an effect here.

Doukhobors:

Another minority group whose representatives claim that they have been adversely affected by a kind of hate propaganda are the Doukhobors. It is estimated that between 20,000 and 30,000 Doukhobors live in Canada. They are classified into three sub groups including 1) 5,000 in the orthodox group living mainly in British Columbia, 2) some 13,000 Independents of whom 8,000 are in Saskatchewan; 3,500 in B.C., 1,000 in Alberta and the remainder throughout the rest of Canada,

and 3) 2,000 to 3,000 "Sons of Freedom" in B.C. (According to the census figures for 1961, 13,324 individuals classified themselves as Doukhobors by religion).

Doukhobor representatives claim that manifestations of prejudice are directed against all the Doukhobors as the result of unacceptable and illegal acts committed by the "Sons of Freedom" over the past several decades. We are not asserting that the "hate propaganda" alleged by the Doukhobor representatives would be actionable under the proposed legislation. We respectfully suggest, however, that this Senate Committee would want to be aware of the precise nature of the Doukhobor situation.

The main examples of the suggested "hate propaganda" against the Doukhobors are to be found in the book "Terror in the Name of God" by the Vancouver writer, Simma Holt, published by McClelland & Stewart Ltd. in 1964. (The material on the Doukhobor question has been provided by a member of the committee which prepared this brief, Mr. Kozma J. Tarasoff, an Independent Doukhobor who is a graduate in anthropology and a specialist in ethnic group studies. Mr. Tarasoff has been a staff-member of ARDA for the past several years.)

The primary complaint about Mrs. Holt's book is that while it is subtitled "The Story of the Sons of Freedom Doukhobors" a large part of its content devoted to the questionable activities of the Sons of Freedom often uses the terms "Doukhobor" and "Sons of Freedom" interchangeably. The sharp differences between the "Sons" and the other Doukhobor groups are overlooked and as a result all Doukhobors are held up to contempt. This contention is at least partially sustained in a *Victoria Times* review of Mrs. Holt's book (Exhibit "O") by R. E. L. Watson of the University of Victoria who states:

Mrs. Holt tends to forget that the great majority of Doukhobors have made a satisfactory adjustment to Canadian life and live as good citizens.

A spokesman for the orthodox Doukhobors in B.C., Peter P. Legebokoff, in a letter criticizing the book in the *Nelson Daily News* (Exhibit "O"), declares:

She (Mrs. Holt) doesn't differentiate between the large majority of the Doukhobors who are true to their faith and live peacefully, and the fanatical element inherent among the Freedomites.

And Mr. Legebokoff adds:

Simma Holt's book in a certain sense could be classed as hate propaganda, by giving a false and distorted picture.

Mr. Tarasoff, who worked with this committee, also reviewed the Holt book in an article published in Canadian Dimension Magazine. He cites at "least 31 cases of innuendo, or the attempt to blame or defame a whole ethnic group of people by omission of important information, by repetition of phrases such as 'the Doukhobor cause' in connection with burnings, etc., or by deliberately placing the blame of a few individuals on a whole group of people."

He also suggests: "In this respect, *Terror in the Name of God* is a form of hate literature similar to the anti-Jewish literature that is presently arousing public concern".

If the proposed legislation had already been the law of the land when this book was published the contents complained of would have a strong defence against any charge brought under clause 267B, subsection 3B on the grounds that it was "relevant to any subject of public interest, the public discussion of which was for the public benefit, and that on reasonable grounds the author believed them to be true."

At the same time, however, if the existence of this provision of the criminal code were known prior to the writing of the book it would likely have influenced the author to a more judicious use of the terminology complained of without affecting the author's total concept. It is our view that the amendments to the Criminal Code embodied in Bill S-21 would thus have a declaratory value.

Mr. Melvin Fenson (Manitoba Human Rights Association): I will take over the reading of the brief at this point, Mr. Chairman.

Suggested Modifications:

There are two more aspects in relation to Bill S-21 on which we should like to comment. The first is the matter of support for the proposed legislation. We are aware that this committee has already been advised of the many organizations who have passed resolutions favouring the adoption of an amendment to the criminal code to outlaw hate propaganda. We have read some of the proceedings of the earlier sessions of this committee and have noted that on at least one occasion a question was raised as to which organizations have endorsed Bill S-21 in particular. Most of the organizations who have

endorsed this legislation passed resolutions of support in principle in the period immediately after publication of the Report of the Cohen Committee and before the first government measure on hate propaganda was introduced in Parliament.

Last year the Manitoba Human Rights Association undertook to contact all those bodies who had previously adopted such resolutions, asking them if they continued to support the proposal as it then stood before Parliament, as Bill S-5. We can report that favourable responses were received from most of them and there were no unfavourable responses. We believe, in fact, that most of those who replied also addressed letters to Senator J. Harper Prowse, who was the chairman of the Senate Committee in 1968. We are submitting several of these letters as Exhibit "P" attached to this brief. Among them are letters from the Canadian Federation of Mayors and municipalities and from the City of Winnipeg.

We also submit a resolution adopted in November, 1967 by the Annual Conference of the Canada Ethnic Press Federation, which took place in Winnipeg. (See Exhibit "P"). This resolution in its substantive part states:

That the Canada Ethnic Press Federation in conformity with the established principles of the constitution of the said Federation, does unanimously express and record its support for the legislation against hate literature embodied in Bill S-5.

This resolution also urges all the members of the Federation which comprise a majority of ethnic newspapers in Canada

to be constantly vigilant in preventing the publication of any prejudiced materials which are likely to foment animosity towards any individual ethnic or religious group.

The proposed legislation as originally embodied in Bill S-49 in 1967 was the subject of discussions by the Civil Liberties and Criminal Justice Subsections of the Manitoba Section of the Canadian Bar Association. We file a summary of the presentation made to the Civil Liberties Committee of the Bar Association (Exhibit "Q") and we present here a review of the opinions of that body from the summary of its discussions

The committee felt that despite the threat to freedom of expression that any legislation in this area involves, members ultimately had faith in the administration

of justice in Canada to exercise wisdom and moderation in applying the legislation to achieve its objects.

The committee expressed itself as being generally in favour of affording the protection of law to groups that are being defamed; and it approved in principle Bill S-49 as it stands, with some important changes or amendments.

This delegation of the Manitoba Human Rights Association fully concurs in the views expressed in these two points.

The Manitoba committees of the Bar Association also felt that the consent of the Attorney General of Canada should be a prerequisite to the institution of any prosecution. The Manitoba Human Rights Association does not feel that this is an essential requirement. However, if the Senate Committee chooses to make such a recommendation we would suggest that it should be possible to obtain consent for prosecution not only from the Attorney-General of Canada but from the Attorney-General of the provinces who are charged with implementation of the criminal code.

The Bar Association Committees felt that the definition of "group" should be spelled out in greater detail so as not to render its application to the Jewish group void for uncertainty.

We would make two specific recommendations in this connection:

In connection with Section 267A Subsection (2) on genocide, we urge that the operative words should be changed to read "with intent to destroy in whole or in part any identifiable group of persons", instead of merely "any group of persons" as in the present wording of the bill.

Senator Haig: That would mean you would require two consents, is that right?

Mr. Fenson: Either one or the other.

The Chairman: The attorney general of the province where the offence was committed.

Senator Haig: You want "either/or"?

Mr. Fenson: Yes.

In Section 267(b) Subsection (5b), we would urge that the definition of "identifiable group" be changed to read as follows: "Identifiable group includes any section of the public distinguished by colour, race, religion or ethnic origin".

The two changes proposed here are to replace the word "means" with "includes" and to add the word "religion" after "colour, race,".

The Manitoba committees of the Bar Association took the view that the 5 clauses in definition of Genocide in Section 267(a) are much too broad. It is the view of our committee that it would be sufficient to reduce the number of specific definitions of genocide from 5 to 2 including "(a) killing members of the group" and "(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction".

The Manitoba Bar Committees supported the retention of truth as a defence and in this we concur.

Special note was also taken by the Manitoba Bar Committee of the extensive consideration which has been given to this subject by the Special Committee on Hate Propaganda which prepared the Cohen Report and by the Standing Committee on External Affairs. Discussion in the Manitoba Bar Committees took place in 1967 at a time when the proposed legislation had been turned over to a joint committee of the Senate and House. Since the legislation has now been placed before Parliament for the third time and a Senate Committee is holding independent hearings on it for a second time, we can only concur and re-emphasize the view expressed by the Manitoba Bar Committees in 1967 that all of these deliberations constitute adequate assurance that Bill S-21 represents the thinking and conclusions of a body of balanced thinkers who have had access to sufficient information and informed opinion.

One last word with regard to the matter of genocide. Canada has ratified the Genocide Convention of the United Nations, but to date no special steps with regard to implementation of the Genocide Convention have been taken. It has been argued that it is sufficient that we have laws against murder and that this is adequate protection against genocide. It should be understood however that murder is only the culmination of the crime of genocide. Bill S-21 should be adopted in order to demonstrate to the world that Canada will put a stop to any measures that could lead to the destruction of an identifiable group of people.

We conclude our presentation with the expression of our sincere thanks to all members of the Senate Committee for the opportunity to participate in these hearings.

The members of the committee of the Manitoba Human Rights Association who worked on the preparation of this brief, beginning with the members of the present delegation are as follows: Melvin Fenson, Walter Hlady, Joe Keeper, Glenn E. Martin, Charles Huband, Koozma Tarasoff, Rev. Adam Cuthand, Mrs. M. G. Saunders, Prof. J. B. Rudnycky, Mrs. H. H. Roeder, A. J. Arnold.

The Chairman: Thank you for that brief.

Senator Walker: May I ask a question?

The Chairman: Yes.

Senator Walker: I understand that you have a special committee on this in the Manitoba Bar Association, is that correct?

Mr. Fenson: There were two subsections, the criminal subsection and the civil liberties subsection, which independently studied Bill S-49.

Senator Walker: Was this ever approved by the Canadian Bar Association?

Mr. Fenson: I am of the opinion that it came before the plenary session in Winnipeg in 1967 and that it was returned to the Executive for further study.

Senator Walker: That is right.

Mr. Fenson: The bar in Vancouver in 1968 did not raise the subject again.

Senator Walker: That is true. The Manitoba bar itself has never approved the recommendations of the committee?

Mr. Fenson: No; the two subsections have.

The Chairman: Are there any more questions? In that case may I convey to you the thanks of the committee. We appreciate the fact that you have come all the way from Winnipeg to make this presentation to assist us in our labours and to bring wisdom, I hope, to our actions.

Mr. Fenson: Thank you.

The committee adjourned.



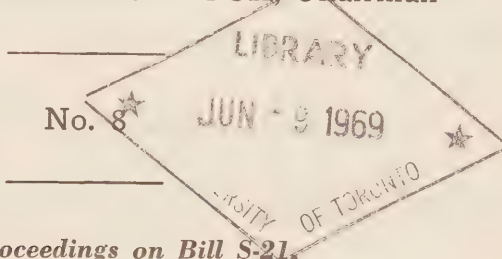
First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE
ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*



Eighth Proceedings on Bill S-21,

intituled:

"An Act to amend the Criminal Code".

THURSDAY, APRIL 24th, 1969

WITNESSES:

1. Mr. J. A. Wojciechowski, Canadian Polish Congress;
2. Mr. Glen How, Q.C., Toronto, Ontario, in person.

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Gouin	McGrand
Aseltine	Grosart	Méthot
Belisle	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly (<i>Ottawa West</i>)	Hollett	Roebuck
Cook	Lamontagne	Smith
Croll	Lang	Thompson
Eudes	Langlois	Urquhart
Everett	MacDonald (<i>Cape</i>	Walker
Fergusson	<i>Breton</i>)	White
*Flynn	*Martin	Willis

*Ex officio member

(Quorum 7)

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code."

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—

Resolved in the affirmative.

Extract from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimbursement as the Committee may determine, and to compensate witnesses by

reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extracts from the Minutes of the Proceedings of the Senate, Tuesday, March 11th, 1969:

“With leave of the Senate,
The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

Extract from the Minutes of the Proceedings of the Senate of Canada, Tuesday, 22nd April, 1969:

“With leave of the Senate,
The Honourable Senator McDonald moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators Giguère and McElman be removed from the list of Senators serving on the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

With leave of the Senate,
The Honourable Senator McDonald moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators McGrand and Smith be added to the list of Senators serving on the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.”

Alcide Paquette,
Clerk Assistant.

MINUTES OF PROCEEDINGS

THURSDAY, April 24th, 1969.

Pursuant to adjournment and notice, the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Choquette, Cook, Croll, Fergusson, Haig, Lang, Macdonald (*Cape Breton*), Phillips (*Rigaud*), Smith, Urquhart, Walker and White.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

The following witnesses were heard:

1. Mr. J. A. Wojciechowski, Canadian Polish Congress;
2. Mr. Glen How, Q.C., Toronto, Ontario, in person.

At 5:30 p.m. the Committee adjourned at the call of the chairman.

ATTEST:

L. J. M. Boudreault,
Clerk of the Committee.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Thursday, April 24, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have two groups to hear from today. We have with us at the present moment Mr. J. A. Wojciechowski of the Canadian Polish Congress. I cannot give you very much more introduction than that, but that is enough I think.

We will call upon Mr. Wojciechowski.

Mr. Jerzy A. Wojciechowski, Vice President, Canadian Polish Congress: Honourable senators, I represent the Canadian Polish Congress, an organization of Canadians of Polish descent. May I say by way of information that according to government statistics there are about 375,000 Canadians of Polish origin in the country at the present moment.

I shall read to you the brief which was prepared by the Canadian Polish Congress and signed by Mr. Jarmicki, the President. I am Vice-President of the Congress. The brief reads as follows:

Honourable senators, this memorandum is submitted on behalf of the Canadian Polish Congress, the supreme organization of Canadians of Polish origin.

As Canadian citizens we hold a firm belief in democratic ideals, traditions and in our system of government. At the same time we are attempting to preserve our Polish cultural heritage which, we believe, will make a valuable contribution to the multi-cultural fabric of Canadian society.

The proposals of Bill S-21 now under review by your committee therefore interest and concern us deeply, being indicative of

Canada's determination to keep this country free of hatred, which has caused so much destruction in other lands, and to promote the existence of a free, orderly and decent society under the law. By this proposed bill, Canada has an opportunity to establish a definite national policy aimed at discouraging and deterring the spread of racial and ethnic hatred: we, ourselves an ethnic group, can only find such an aim commendable.

We are not in a position to analyze the legal aspects of the bill now under consideration—we wish, however, to express our general opinion on the proposed legislation.

The bill is divided into three main proposals. The first clause proposing to ban genocide should have found little objection, considering the horrible manifestation little more than 20 years ago, and yet, an objection has been raised that the enactment of such a ban could be construed as a kind of slur cast on the good name of Canadians, since it is unlikely that we stand in danger today of witnessing this kind of incredible heinous crime in this country. As unthinkable as this offence is, it would be unrealistic to state positively that it could never occur under any circumstances. Its last occurrence, in a country where many of our citizens were born, is too fresh an event to eradicate from our minds.

If I might add another personal comment from my mind, because I have witnessed it.

The Chairman: You have witnessed it?

Mr. Wojciechowski: Yes, I have.

These critics have, however, missed the vital point in the clause proposed in Bill S-21. It is not only genocide per se that would be an offence, but the incitement to and the promotion of genocide. Uttering threats against an individual, threats of injury, violence, or death has long been forbidden by our criminal law. This clause proposes to forbid the threat or the advocacy of injury or mass extermination against a racial, ethnic or national group. What is involved here is pro-

tection for a group rather than for an individual, but basically, protection for an individual and protection for a group are both really forms of protection for the whole of society. There is nothing in this, it seems to us, discrepant or contradictory to the existing and accepted principles of law or morality, on the contrary, collective protections are what distinguish a civilized from a barbaric society. To urge the idea of genocide, to incite hatred or injury against any identifiable group is monstrous, and if the law at present does not cover these breaches it is high time, honourable senators, to rectify the oversight.

The second proposal forbids the incitement to hatred against racial, ethnic or national groups that would lead to a breach of the peace. After discussing the subject with member organizations we were faced with the assumption that this law already exists on our statute books. Is not incitement to violence and talk that leads to disorder already forbidden under the law? Not in the circumstances stated above. This is a gap in our jurisprudence which should be bridged. All of us, as supporters of civil liberties, have agreed that the law should not and cannot condone violence and the advocacy of violence. The enactment of this clause would bring this particular phase of public disorder into the framework of what is already covered by our existing laws.

The third clause, dealing with the wilful communication of untrue statements, knowing them to be false and not for the public benefit, which promote hatred against an identifiable group, is the part of the bill that introduces something new. But, on closer examination, it is not based on a novel philosophy. We punish people for perpetrating financial fraud, for misrepresentation. We have pure food laws that protect the consumer. Manufacturers and food processors cannot arbitrarily label their products, claiming that a product contains an ingredient, when it actually does not. A certain kind of packaged beef cannot be marketed as bacon, nor can the packaging be misleading in order to deceive the consumer. Drug manufacturers are strictly regulated in labelling their products. Stock prospectuses are very carefully watched to protect the public against fraud.

And yet, honourable members of the Senate, when we depart from the pocketbook we lose that fine concern for the public: we are ready to permit the wildest lies, the most

pernicious falsifications, the most offensive and hate-instilling forgeries to pollute our atmosphere and to poison our climate of opinion. Must our laws be concerned primarily with matters of the purse? Why should there be strict regulation of consumer goods, and yet total anarchy in the more important area of public weal, affecting the happiness of millions, where slander and hatred are allowed to flourish unchecked? This outmoded laissez-faire attitude has survived in this sphere long after it has been discredited everywhere else. This is a piece of legislation which is long overdue.

Without doubt, other briefs have dealt with the safeguards that Bill S-21 contains. These safeguards indicate that whoever drafted the Bill is quite sensitive to the demands of freedom of speech—something we strongly favour and value. The idea that the truth of any particular statement may be used by an accused as his defence certainly recommends itself to us as a legitimate and desirable safeguard, being cognizant of the fact that in cases of seditious libel, obscenity and scurrility, this is not the case in our present law. This safeguard ensures that the law would be directed only against those statements that are wilfully false: the 'public benefit' provision ensures that no one would be penalized for expressing an opinion within the context of a discussion in good faith on public affairs. It is our understanding that the Bill does not propose to interfere with speech or publication, but that it proposes to provide a recourse for ethnic, racial and religious groups against wilful slander, and of such a proposal we cannot but heartily approve.

Honourable Chairman and members of the Senate Committee, our position rests on the belief that a great future lies in store for Canada, a future wherein all its races, ethnic groups and creeds will find a way to live harmoniously and peacefully. Law is one of the most persuasive educative factors there is. When fair employment and accommodation laws were introduced in Ontario and in other provinces, the complaints were widespread that the law would prove ineffective, that it would not change people's emotions and prejudices, and that it would be impossible to prove discrimination. Yet despite all these misgivings the legislation *has* worked. Has it done away with prejudice? Of course not. It was not intended to. Its task was to diminish the external manifestations of prejudice—discrimination in jobs, in housing and in accommodation. In this purpose it has

achieved considerable success and no one now suggests the repeal of these laws. They have proved educative.

We feel there is a direct analogy with Bill S-21. The bill will not eradicate bias and bigotry—that is not its purpose. But it can remove the external active reflection of that internal bias—the promotion of genocide, the incitement to disorder and violence and the preaching of racial and religious hatred. This will also, in time prove educative.

For these reasons we earnestly urge the adoption of Bill S-21 and trust hopefully that your recommendation to Parliament will be a positive one.

The Chairman: Thank you for that, Mr. Wojciechowski. Are there any questions that the senators would like to ask the witness?

Senator Macdonald: I wonder, Mr. Chairman, if the witness would give us some idea of the Canadian Polish Congress, who they are, their aims, and so on?

Mr. Wojciechowski: The Canadian Polish Congress, as I said, is the central organization of all organizations of Canadian Poles. The members of this Congress are not individuals, but organizations. Individuals are members of the Congress through their organizations; there are about 280 or so organizations participating in the Canadian Polish Congress of all sorts, business groups, professional groups, veterans' associations, and so on.

The purpose of the Congress is to offer, first of all to the Canadian Poles, a sort of meeting ground, a sounding platform, to represent to the authorities this ethnic group whenever it is necessary to make representations, and in general to further the development of what we consider are valuable elements of Polish character integrated into the Canadian, say fabric, the fabric of Canadian life. That I would say is in a very general way our aim.

Senator Walker: Thank you very much for your presentation. When did you come to Canada; after the war?

Mr. Wojciechowski: It will be 20 years in July.

Senator Walker: Yes, 20 years. Is it correct to say that what you are telling us today is because of your experiences in the old country?

Mr. Wojciechowski: Yes, very much so. It happens that during the extermination of the Warsaw ghetto I lived about 50 yards from the ghetto wall, so I witnessed it.

Senator Walker: Yes, so your idea is that reciting that experience and bringing it to our attention, that something like it may happen here at some time?

Mr. Wojciechowski: I do not think it will, but I also know how easy it is to store up hatred; I saw this being done by the Hitler propaganda before the war and during it.

Senator Walker: Yes, exactly, but you will be glad to agree with me that in your experience in Canada you have not experienced anything like this?

Mr. Wojciechowski: Not at all.

Senator Walker: Thank you very much. That is all.

The Chairman: Are you in law?

Mr. Wojciechowski: No, I am a Professor of Philosophy at the University of Ottawa.

The Chairman: I think I can say thank you on behalf of the entire committee, Mr. Wojciechowski. You have performed a public service in bringing this to our attention. I understand from what you say that the presentation of a brief such as this is within the constitutional purposes of your organization?

Mr. Wojciechowski: Very much so.

The Chairman: And that you represent in these various organizations, did you say 175,000?

Mr. Wojciechowski: We are 375,000.

The Chairman: Three hundred and seventy-five thousand people of Polish origin?

Mr. Wojciechowski: Polish descent, yes.

The Chairman: Many of whom have lived here for a long time?

Mr. Wojciechowski: Yes, many who have lived here for, let us say, more than one generation.

The Chairman: Yes, and so far as you know they are unanimously in agreement with what you have said?

Mr. Wojciechowski: So far as I know. This has been discussed. There may be some individual dissent, but this represents the opinion of the organization.

The Chairman: Thank you very much, sir.

Honourable senators, we have another witness today, Mr. Glen How. I fancy I need no introduction on his behalf. He has been very well known in this country and has taken some very prominent positions of which I think you are all more or less familiar. He is here today representing himself.

Mr. W. Glen How, Q.C.: That is correct.

The Chairman: And I am sure you will all be glad to hear from him.

Senator Walker: Is this the Queen's counsel?

The Chairman: Yes, sir.

Mr. How: Honourable senators and Mr. Chairman, I am appearing here primarily as a lawyer who is deeply concerned about the effect this proposed bill can have, and I may tell you will have, on the law of Canada.

While the learned chairman has suggested that you are all very familiar with my background, I think he overdoes it in kindness. May I just say that I have been for 25 years general counsel for the minority group known as Jehovah's witnesses. During that period I have appeared either personally or in consultation on most of the major civil liberties cases that have been decided in this country. In consequence I have special experience, not only because of what one can learn oneself, but also from hearing outstanding members of the bar representing the Attorneys General of the various provinces. At the same time I have also had the privilege of appearing before the Supreme Court of Canada and other courts of appeal throughout the country whereon have sat some of the finest minds that have ever come to the bench and bar in this country.

So when I speak to you, gentlemen, I do not pretend that I thought of all these things myself, but it is rather I seek to assist you with a distillation of what has been learned from many of these other fine minds over this period.

Now, just coming directly to the matter at hand, may I make this brief introductory statement, because I have had a little experience and I have done some writing on this subject, and I would file a copy of my article with the learned chairman before I leave.

The point is this . . .

Senator Walker: Is this your brief; did you write this yourself?

Mr. How: Yes I did, that is correct. I have a number of references which I believe you will find valuable.

Senator Urquari: How long have you been with the Jehovah's witnesses' organization?

Mr. How: For 30 years, sir.

Senator Lang: Before you proceed, Mr. How, could you give us a rough, ball park estimate of how many civil liberties cases you have been involved in as counsel or assisting counsel during your practice?

Mr. How: It would be very hard to remember; I may tell you, Senator Lang, that at one point we had 1,800 cases going at one time in the cities of Montreal and Quebec, and in other provinces.

Senator Phillips (Rigaud): That would involve a uniform legal principle?

Mr. How: That is right.

Senator Phillips (Rigaud): So it was really one legal case.

Mr. How: Not quite, sir; I will tell you why.

Senator Phillips (Rigaud): No, I do not want to take up time with why, but broadly speaking would it not be fair to say that the 1,800 cases involved the determination of one legal point?

Mr. How: Not quite, sir, no. The first major case that we had in the Supreme Court of Canada, myself, was the case of *Boucher vs. The King*, 1951, Supreme Court Reports, page 265.

Senator Walker: Did Rand write the judgment there?

Mr. How: He wrote one of them; that case was up twice. We heard it once and the Supreme Court judgment was left in an uncertain state after five judges heard it. I moved for a rehearing before the Supreme Court and it was heard before nine judges and this time we were successful in having that case dismissed with the result that about 125 other cases fell with it.

So that partly answers your point.

Senator Walker: What was the principle involved in that case?

Mr. How: The charge there was publishing a seditious libel. That was the charge, but the principles underlying seditious libel really are very close to the very issues that are dealt with in this bill here, because in simple language it comes to this: What is a man allowed to say? What can you address the public about and what are the limits of your right of expression? Now, that was the principle that was up for consideration in the Boucher case.

This particular branch of the law has a very interesting history and the case was of extreme importance. I may explain that there were certain principles of the law of sedition that were accepted for a very long time, in fact right up until the Boucher case. I have set these out in my factum and I will just refer you to the actual language that was formerly accepted. You will find this at page 21. This is a very key point, really, for your deliberations, if I may respectfully so submit.

Right at the centre of the page you will see an (a), a (c) and a (d). The point is this was the test, this was the legal definition of what a person could say under the law of sedition and it was an offence to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or the Government and Constitution...

Senator Phillips (Rigaud): May I interrupt you, please? You are delving into your brief on the basis of going into the subject-matter, as I understand it, of seditious libel?

Mr. How: That is correct.

Senator Phillips (Rigaud): And relating it to the old obscure background of the star chamber, with which the honourable senators are familiar?

Mr. How: That is right.

Senator Phillips (Rigaud): Do you mind conditioning us as to where the law of seditious libel relates itself to the subject-matter of the bill presently before us? I fail to see where the problem of genocide and inciting the hatred and the publication of untruthful matters has any analogy to the law of seditious libel. Maybe I for one will follow you in the study of the very interesting subject of sedition, with which incidentally we are most familiar, if you will be good enough to at least convince us that the law of seditious libel warrants our study, rather than the study of this bill.

Senator Walker: My understanding is that you are giving us the star chamber law, which was the law until the Boucher case; is that not correct?

Mr. How: That is right, sir, and that is the reason why it is extremely important, Senator Phillips, because I will tell you in short and simple language.

Senator Phillips (Rigaud): Please do.

Mr. How: This bill is designed to reverse the decision of the Supreme Court of Canada in the Boucher case.

Senator Phillips (Rigaud): Designed to what?

Mr. How: To reverse the decision; I should not perhaps say "designed". I should say the effect of this bill is to reverse the decision of the Supreme Court in the Boucher case and reinstate the dragnet definition of the star chamber in Canada.

Senator Phillips (Rigaud): Would you be good enough, instead of indicating what would be the result of the enactment of this bill on the Supreme Court decision—I would incidentally say that the best authority to deal with that subject-matter would be the Supreme Court itself, to determine whether its findings should or should not be reversed, if this bill were passed.

Mr. How: How do you expect to get this bill in front of the Supreme Court of Canada?

Senator Phillips (Rigaud): May I put a question?

Mr. How: Yes, sir.

Senator Phillips (Rigaud): I will repeat the question: Where does the subject-matter of seditious libel bring any relevancy or analogous matters that require our present study of the law of seditious libel in order to help us to determine the merits of this bill?

Mr. How: I will be very pleased to, if you will allow me, Senator Phillips. Your question is well taken and I am happy to give you an answer.

Senator Phillips (Rigaud): Thank you.

Mr. How: Because the proposition is simple enough. I do not care what you call it; let us not be led aside by labels.

The substantive question for consideration here, as it was in these other cases also, is

what are the definitions and what are the limitations as to what people can say as a matter of information and communication to other citizens and what are the relevant considerations on the opposite side from the standpoint of maintaining public order? This is the fundamental question of all civil liberties issues.

Senator Phillips (Rigaud): May I put this question to you: Are you suggesting in the presentation of your brief and your line of argument that the Parliament of Canada is not entitled to pass legislation which would have the effect of setting aside the reasoning of the Supreme Court of Canada?

Mr. How: I have made no such statement, senator.

Senator Phillips (Rigaud): I thought you said that you were basing on that your remarks, your presentation and your objections to this bill, because I see in your conclusions that you do object to this bill?

Mr. How: Yes, that is right.

Senator Phillips (Rigaud): That the net result of this legislation would be that, to have the effect of setting aside the judgment of the Supreme Court of Canada.

Mr. How: That is correct.

Senator Phillips (Rigaud): Would you direct yourself to my question. What is your answer to the proposition that the Parliament of Canada has the right to consider and pass legislation even though the effect would be to set aside the reasoning of the Supreme Court of Canada?

Senator Lang: Mr. Chairman, I do not think we are bringing in the question of the competency of Parliament. I think Senator Phillips is going a little far when he suggests that the witness is saying Parliament is not competent to do this.

Mr. How: My present position, gentlemen, is simply this. It is not a question of permissible power, it is a question of advisable power. We are at the present time, I suggest, in an advisory position, which is the proper position of this committee, and it is my purpose to urge to the committee that this proposed legislation is most inadvisable.

The technical question of whether or not Parliament has power to pass it is a very fine constitutional line which I do not think it falls upon us to settle.

Senator Croll: Why? Is there some doubt in your mind?

Mr. How: If you, Senator Croll, will examine some of the comments of Mr. Justice Abbott of the Supreme Court of Canada and also Mr. Justice Rand in the Saumur case, you will find that the question that Parliament could ever go so far in enacting legislation as to essentially destroy the operation of democratic government.

Senator Croll: And this destroys democratic government?

Mr. How: No, but sir, with great respect, let us be fair; I did not say it did. You asked me a technical, constitutional question.

Senator Urquhart: Let him talk about his brief then.

Senator Walker: He was until he was interrupted and he has been interrupted ever since he started.

Mr. How: May I say, honourable senators, that I appreciate your great interest and I know that this is, if I may be vulgar, what is known as a gut issue; this is hitting at the substance of the operation of this nation and I appreciate your concern. I am glad to have your questions, but I think if you will allow me I may be able to be of assistance.

Senator Choquette: Mr. How, we have heard several briefs and we know, as many lawyers do, that we could argue on one sentence of your brief and cross-examine you at great length and we would not finish by six o'clock this evening, or six o'clock tomorrow.

Now, the custom so far has been for a witness to read his brief from beginning to end. I think you are on dangerous ground when you start at page 21 and you are being cut down to one single line. I suggest that you follow the custom that has been followed until now, I might be wrong, but I do not think you would get into as much trouble as you are now getting in if you were to read your brief from beginning to end, and then invite questions.

The Chairman: If the Chair might be heard in this connection, that would probably be the most expeditious method of procedure.

At the same time the Chair here on this occasion has no desire to interfere with any senator who wishes to ask a question; that is always open to the members in this kind of

sitting. This witness is eminently able to take care of himself, so I think if we proceed along those lines and you read what portion of it you care to, Mr. How, not the whole of it unless you wish to do so.

Mr. How: Honourable senators, in the light of the kind suggestions that have been made to me, if I may turn to the brief I may, departing very slightly from the helpful suggestion of Senator Choquette, summarize some of the points which I have set out at more length. I just want to make this initial comment, because there has sometimes been quite a lot of misunderstanding in relation to this proposed legislation. Whenever anybody criticizes it or disagrees with it, although it may be on the most strictly legal grounds, it is sometimes and I have myself been accused and quite falsely of being anti-Semitic and I do not think that is fair. Just like you have had some prominent Jewish lawyers come here before this Committee and disagree with the bill; I think that speaks for itself.

I may say too that it has sometimes been said that the Jewish people are the only ones that are concerned about this matter because they are the ones that suffered primarily under the concentration camps. I may tell you that Jehovah's witnesses are an international organization who also suffered, very deeply, and therefore we are most concerned about this whole problem.

Senator Phillips (Rigaud): In the same ratio of six million in the gas chambers?

Mr. How: We did not have six million.

Senator Phillips (Rigaud): I just wanted to know what proportion of six million did you have?

Senator Walker: Is that a point in this argument?

Senator Phillips (Rigaud): Instead of sticking to the brief we have been going into the question of the Jehovah's witnesses. I am ready to meet the witness on that ground. As long as he remains relevant I will be as courteous as possible, if he will stick to his brief and the subject-matter of this bill.

Mr. How: Sir, this is in the brief and that is why I am dealing with it. I must just refer to Professor Ebenstein of Princeton University who in his book *The Nazi State* mentions, and I quote him at the top of page 2 that:

When the witnesses did not give up the struggle for their religious convictions, a

campaign of terror was launched against them which surpassed anything perpetrated against other victims of Nazism in Germany... The sufferings of Jehovah's witnesses in the camps were even worse than those meted out to Jews, pacifists or communists. Small as the sect is, each member seems to be a fortress which can be destroyed but never taken.

Relevant to your comment, Senator Phillips, I draw to your attention the third item on page 2 under Nazi persecution, which quotes from page 196:

Foremost among the opponents of Nazism were the Jehovah's witnesses of whom a higher proportion (97 per cent) suffered some form of persecution than any of the other churches. No less than a third of the whole following were to lose their lives as a result of their refusal to conform or compromise. In contrast to the compliance of the larger churches, the Jehovah's witnesses maintained their doctrinal opposition to the point of fanaticism...

This is simply to illustrate a point, gentlemen. The quotation is there and I will not go on in detail; I am just doing it for this reason, to know that Jehovah's witnesses have suffered under Nazis and under concentration camps and are very opposed to any of those practices. We have deep sympathy with the Jewish people who feel this way about it and I exactly understand why they feel this way.

The only thing is, gentlemen, no matter how we feel about it we cannot reverse history and we have to look at the statute which we have got in front of us to determine whether or not it is a good statute, whether or not it is going to be advisable, regardless of what may have happened over history. We can learn from history, but we cannot reverse it.

The Chairman: And we do not want it to be repeated.

Mr. How: Indeed we do not want it to be repeated; that I agree with.

Senator Urquhart: Are you able to substantiate the statement that the sufferings of Jehovah's witnesses in the camps were even worse than those meted out to Jews, pacifists or communists?

Mr. How: Sir, that was the comment of Professor...

Senator Urquhart: I know it was, but are you able to support it?

Mr. How: Only from my knowledge I can say this, sir, from what I have read and what I have learned, from being in Germany and meeting those of my associates who were in the concentration camps.

The point is this: it is a brutal record that a person who is Jewish, they could put him to death, but he could not stop being Jewish because that is the way he was born, but with Jehovah's witnesses you can resign and they put these people in concentration camps always ready to let them out if they would sign a document abjuring their faith.

Therefore they have got people under these circumstances who were refusing to bow to the Nazi state and therefore every kind of inhuman torture that could be devised was used in order to break them. That is the reason.

Now, the other thing...

Senator Urquhart: Is that documented?

Mr. How: It is documented, sir, and in some of these volumes and we have more detailed documentation that I can provide if you are interested.

Senator Urquhart: But you have not them here today.

Mr. How: I have not them here today because I simply quoted these outside authorities.

Senator Walker: Is Ebenstein not a great Jewish professor?

Mr. How: I understand that Ebenstein is a well known Jewish professor.

Senator Urquhart: I understand that; I asked if it can be supported, that is all.

Mr. How: Yes, it can be supported, sir, but this was only an incidental matter today so I did not go into it in detail.

Senator Lang: I suppose that we can accept quotations from authorities without questioning the validity of those authorities.

Senator Urquhart: Who does?

Senator Lang: The court does.

The Chairman: I suppose part of the persecution to which your people were subjected

was the misrepresentation of them; am I right in that?

Mr. How: It was the actual violence; we were not worried about the misrepresentation, because we believe in free speech and if somebody misrepresents we will answer them and we are perfectly willing and able to answer them, but we do not want any special laws to restrict anybody from making their statements and their arguments. That is how false prophets and false arguments are answered, by giving them a straight answer, not by trying to silence them. That is my answer to that.

Now, gentlemen, coming down to the next step I come now to the direct consideration of where I submit the things we have to take into account in looking at this bill are. In other words, this proposed bill has to be examined in the light of the overall context of the Canadian situation and its operation.

Now, it is my respectful submission as far as the Cohen Report is concerned that they have concentrated, if not a hundred per cent, to a very large percentage on the mischiefs, the problems that might arise by the exercise of expression of communication. They have failed, in my respectful submission, to give reasonable weight to the value that we have from the exercise of a free press and people expressing their opinions.

I do not make any effort and I do not know if anybody else does to defend this kind of trashy material, but the point is let us not in an effort to stamp out what is irrelevant and ineffective be stamped into passing a law that can be used to stop a lot of other material that may be quite valuable. I am not coming at this juncture to the specific terms of the bill; I will get to that later, but I am just saying this as a principle.

Now, I quote first on page 4, Chief Justice Duff where he talks about the government in this country. This is from his judgment in the Alberta case and he says that:

The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals...

Then he goes on to say:

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

Now, I pause there, gentlemen, to underscore the expression notwithstanding its incidental mischiefs. Anything that you have that is useful is going to be open to some abuses. Everybody uses automobiles; we are glad to see them, it is a wonderful way of travelling around, but if people get impaired and drive wildly they can do damage with them, but if you try to concentrate and focus on the destruction of all the incidental mischiefs the net result is that you also destroy the value of the exercise of the freedom itself.

Senator Phillips (Rigaud): May I put a question to you on that, because I think you are now relevant to the issue: Do you object to legislation which determines the speed at which an automobile may travel?

Mr. How: I do not object to that, sir.

Senator Phillips (Rigaud): Just answer my question; you do not object to the speed law?

Mr. How: No, sir.

Senator Phillips (Rigaud): Therefore, why should you object to the qualification of the right of free speech in certain circumstances when you do not object to a law against locomotion that is excessive?

Mr. How: All right; may I answer, sir?

Senator Phillips (Rigaud): Yes, I would like the answer to that?

Mr. How: I will answer it; I do not object to the speed laws they already have because I think they are reasonable.

Senator Phillips (Rigaud): Never mind if they are reasonable.

Mr. How: Do you mind if I answer, sir? You asked a question, may I answer?

Senator Phillips (Rigaud): Yes, please do?

Mr. How: Thank you. The point is, sir, reasonable speed laws such as we have I have no objection to but if they pass a speed law that says no motor vehicle may be driven on

the highway at more than three miles an hour, I am certainly going to object. Reasonable regulation nobody objects to, but unreasonable regulation has already been held by the Privy Council in *Virgo v. The City of Toronto* to be prohibition, and so that type of speed legislation would in essence be prohibition of driving automobiles. I may say that overdoing legislation of this kind under the guise of regulation would be in effect prohibition of freedom of speech; that is really the answer to this whole proposition.

Senator Phillips, if I may say in fairness I think we both recognize, or certainly I do and I am sure you do, that there has to be a certain range of regulation; there is no question about that. What we are trying to determine is what is the reasonable range and in order to determine what the reasonable range is surely we have to look at the overall context of our constitution as well as the history of the cases where some of our finest judges have sought to determine what the limits are; that is the subject-matter of this hearing.

The Chairman: May I ask, witness, what would you say would be the reasonable limit of the regulation of free speech in the matter of protection of identifiable groups?

Mr. How: The reasonable limit, Mr. Chairman, and I will come to it very shortly, is exactly what is set out in the Criminal Code. There is not a thing wrong with it. Mr. Justice Varcoe, the late Deputy Minister of Justice, said that all the problems that are dealt with in the international United Nations ruling on this question, I have forgotten the technical name of it, that they are all dealt with in the Criminal Code now, and I take that position, that it is reasonable to apply what is in the Criminal Code. I want to say this, that the people who have been doing the arguing, who have been presenting all the briefs here, the main motivating force has been the Canadian Jewish Congress and I have asked them repeatedly why do you not take a case; why do you not try even one case, because some of their counsel have recommended it and it has not been done. In my respectful submission, nobody has a right to come before Parliament and say we need some new laws until they have made a reasonable and sincere effort to enforce the laws that we have.

That is my submission on that point.

The Chairman: Would you tell us what there is in the Criminal Code upon which the identifiable groups can rely?

Mr. How: Yes, I will be very pleased, but do you want me to go to that now?

The Chairman: No, I do not want to interfere with your presentation at all, but I wish you would do that in the course of your address.

Mr. How: Yes, I would be very pleased. Now, gentlemen, I would like to come next to the case you will find on page 5; this is an English case that emphasizes the same point, the case of *Wason vs. Walter* concerning free press:

... though injustice may often be done, And I am sure some of the papers here are most unjust:

and though public men have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties.

In other words, let us not underrate or underweight the positive values that freedom of expression and a full play of public opinion can bring us.

Senator Urquhart: Did this case have to do with freedom of the press?

Mr. How: Yes, sir.

Senator Urquhart: What was the main issue?

Mr. How: I must be honest, sir; it is some time since I read the case itself.

Senator Urquhart: This is not arbiter dicta of the case?

Mr. How: No, I do not believe so; it is part of the ruling, part of the consideration of the court at that time. It is some time since I read it.

The Chairman: I was going to ask you on this point, was that case not based upon libel or slander?

Mr. How: I believe so, yes.

The Chairman: So there is law with regard to libel and slander which he was discussing at that time?

Mr. How: Yes, of course.

The Chairman: So that the hostile criticism to which he referred was outside the scope of either libel or slander.

Mr. How: I cannot answer that now. I seem to have picked out the principle there. I can get the case and look at it if you might be interested.

I would like to take time to read the next case because it gets down to the fundamental aspects. Before doing so, may I first present something for filing. I mentioned an article I had written on this subject which appeared in *Maclean's* magazine of January 2, 1965. With your kind permission, Mr. Chairman, I would like to file this.

The Chairman: With the permission of the committee, let it be filed.

Mr. How: Perhaps copies could be made available to the honourable senators.

The Chairman: We will try to arrange that so that each one will get a copy.

Mr. How: Honourable senators, coming back to the brief which I prepared, may I draw your attention to page 5 where there is an outstanding analysis of the principles that should be taken into account in determining the limitations of freedom of expression. This is the case of *Whitney v. California*, an American case; the decision was by Mr. Justice Brandeis. He is a famous Jewish judge in the United States.

Senator Phillips (Rigaud): Would you call him a Jewish judge, Mr. How, or would you call him a citizen of the United States?

Mr. How: No sir, I think he was both.

Senator Phillips (Rigaud): I find it a little difficult to follow your descriptive terminology in your presentation.

Mr. How: I am sorry if you find it difficult to follow, sir; I will be glad to explain it further if it would be helpful.

Senator Phillips (Rigaud): Yes; excuse the interruption.

Mr. How: The reason that this is specifically relevant here is this: That in a free state the problems related to freedom of expression are the same; it does not really make that much difference which side of the border you are on. This is a very deep and thoughtful analysis. I will just read it:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties and that in its government the deliberate forces should prevail over the

arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.... But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears... Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it... But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.

Senator Phillips (Rigaud): Do you mind amplifying what in your opinion is the meaning of Mr. Justice Brandeis when he emphasizes that it is not a justification for denying free speech where the advocacy falls short of incitement; what do you think, Mr. Justice Brandeis meant by that?

Mr. How: It is very simple, sir. Incitement is direct action, clear and present danger. In other words, if I have a mob here of unemployed and we see a millionaire coming out of a club across the street and I say, "Let us get him, boys," that is incitement. But if I am addressing a group in a hall and I say, "Gentlemen, I advocate that we go out somewhere and start getting organized to change this system of things," now, that is advocacy, because you are saying let us get organized.

Incitement is direct action: now, that is what is meant by clear and present danger.

Senator Phillips (Rigaud): If a speaker says to people in the hall, "I personally dislike all people with curly, brown hair and I suggest we immediately get organized and kill all people with curly brown hair;" would you judge that as leading to incitement?

Mr. How: Well, when you say leading to incitement, yes it is leading to incitement.

Senator Phillips (Rigaud): Would you regard it as being within the exception to which Mr. Justice Brandeis refers in this leading case?

Mr. How: Well, Mr. Phillips, the point would be this: In all these things there is no one single fact that governs; that would depend on the crowd that you are talking to and the circumstances of the time as to whether or not it is advocacy or incitement. I understand your point. It is very well taken and I do not disagree with you. If I may read the rest of this I think it contains the answer. Your point is well taken, sir.

Senator Phillips (Rigaud): May I come back that in my opinion it does not contain the answer to my question.

Mr. How: Sir, you are entitled to your opinion.

Senator Phillips (Rigaud): Thank you.

Mr. How: *Reading*

But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.

I am sure the words "the difference" have been omitted inadvertently.

In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated,—

Senator Phillips (Rigaud): Or advocated; or was advocated. Will you be good enough to draw the attention of the senators to that.

Mr. How: Yes, but remember it is immediate serious violence; it is not something in the remote future, it is immediate serious violence.

(Reading)

—or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. they did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

...The fact that speech is likely to result in some violence or in the destruction of property is not enough to justify its suspension. There must be the probability of serious injury to the State.

Now, the essence of that is that it is really a study in political science, and I simply say all those same principles equally apply in Canada. The minute you apply those principles then this whole allegation of the Cohen Committee simply falls to the ground, because they are so far from being anything even faintly resembling a clear and present danger. Further, that even if there were, this bill goes much beyond any of the right principles respecting freedom of speech and the press that Mr. Justice Brandeis has enunciated.

Senator Lang: The bill actually uses the word advocate, not incite; in other words, it falls squarely within the point he is making in that second paragraph.

Senator Phillips (Rigaud): The bill refers to the word advocate, Senator Lang, but leading to the possibility of genocide.

Mr. How: Yes, but leading to the possibility, and "possibility" is so broad and uncertain that it simply winds up that the prosecutor does not have to prove anything at all.

Senator Phillips (Rigaud): We are very happy to rely on Mr. Justice Brandeis' mind.

Mr. How: I am pleased, because Mr. Justice Brandeis points out that if there is time to

expose to discussion the falsehood, the remedy to be applied is more speech and not enforced silence. As far as this material, this so-called hate literature that has been produced, it is so far from convincing anybody that there is lots of time to reply.

The very fact that the material the Cohen Report discussed was in 1964 and the country has been getting along just dandy up until now, speaks for itself, that there is no present and clear danger within the principles Mr. Justice Brandeis enunciates.

Senator Phillips (Rigaud): Are you suggesting there should be no law against theft because there is no present danger in any given place?

Senator Lang: A trust company was robbed last week, Mr. Phillips; it is quite a present danger.

Mr. How: I think the proper answer, surely, is this: We have a good law against theft and the fact that a theft has been committed is no reason for abolishing the law and making a completely new law. We have law and I am for it.

Senator Phillips (Rigaud): Would you give me the law if I say to an audience I would like to kill and I think it would be a desirable thing to kill, as I said before, people with curly brown hair, or whatever I said; would you give me some section of the law in the Criminal Code which you have described in effect as being wholly effective?

I am not a criminal lawyer, so would you be good enough to give me the section of the Criminal Code under which I could get after such a person?

Mr. How: Yes, I certainly can; I have got the Criminal Code here.

Senator Phillips (Rigaud): Would you give me the section?

Mr. How: Yes, section 160 would convict him right now.

Senator Phillips (Rigaud): Would you read it for me, where you think that under that section I could reach that man?

Mr. How: Yes, I would be very pleased if you will let me read it; you will find this on page 13.

Senator Phillips (Rigaud): In the Criminal Code or in your brief?

Mr. How: In the brief:

Every one who not being in a dwelling house causes a disturbance in or near a public place, by fighting, screaming, shouting, swearing, singing or using insulting or obscene language.

Certainly if I stand up in a public place and say to an audience we ought to go and kill all the Jews right now, if that is not insulting language, I do not know what it is, and the man is going to be convicted.

Senator Phillips (Rigaud): So that with sincere conviction on your part you tell me as a practising lawyer for 50 years that section 160 is a section on which I can rely to bring a person who wants to kill all people who have curly brown hair to justice; is that your answer to me?

Mr. How: Now, with the greatest of respect, senator, let us be far; what you have just said is not what you said before.

Senator Phillips (Rigaud): I will repeat the question. If I listen to a man in a public assembly who says that he is in favour of and asks all people present there to agree with him that it is desirable to kill all people who have curly brown hair, do you say that section 160 is the section of the Criminal Code that I can invoke in order to bring that man to justice?

Mr. How: In many cases I believe it would be; there may be some exceptions.

Senator Phillips (Rigaud): All I can say, my dear witness, is that you have insulted my intelligence beyond reason.

Senator Urquhart: And mine too.

The Chairman: What is the penalty?

Senator Lang: I think, Mr. Chairman, if I am not mistaken, and I would like Senator Phillips to hear this: if I am not mistaken it can be easily found. Beattie, the notorious...

The Chairman: Nazi.

Senator Lang: So-called Nazi, a demented kid, was convicted under section 160.

Senator Phillips (Rigaud): I do not care who was convicted under any section; I put a specific question and I want a specific answer.

Senator Lang: That is what he said.

The Chairman: He was acquitted, you know.

Senator Lang: Not under section 160; Beattie was up before the courts twice.

Senator Cook: He might have used other language, insulting language.

Senator Urquhart: Murderous intent is another thing; it is quite different from insulting language.

Mr. How: I do not know what the penalty is; it is not set out in this section. It must be set out somewhere else. I would like to check.

Senator Phillips (Rigaud): You have answered my question; thank you very much.

Mr. How: Thank you, senator.

The Chairman: Before we leave this, witness, may I ask a question or two?

Mr. How: Yes, sir.

The Chairman: This was spoken at a time when political change was in order and had been taking place and was in discussion. Was that not what he had in mind when he spoke about free speech, and so on, and advocacy—was he not talking about changes in the situation of the country rather than the abuse of individuals?

Mr. How: This was a criminal case that he was talking about, where this Whitney had been charged under the Criminal Syndicalism Act of the State of California with having said something which was in essence—the exact language I cannot come back to at the moment—going to upset the state.

The Chairman: Upset the state, yes.

Mr. How: So he was here dealing from the standpoint of political science with what the limitations are, what the principles that ought to be taken into account are.

My proposition, in short, is simply this: there are two considerations that have to be weighed. One is the consideration of freedom of expression and the value that it has to the state; the opposite side is the danger from the standpoint of insult, tumult and disturbance of the civil state. These are the two balancing considerations.

Senator Cook: This amendment is not directed to protect the state; it is directed to protect a group. The state can look after itself.

Mr. How: That is the theory of it.

Senator Cook: It is not the theory of it: it is the purpose of it.

Mr. How: The purpose, but the point is, sir, that when we draft legislation you and I may have a certain idea of what the purpose is, but before we finally determine it we have to look at it from the standpoint of the experience of application of these various statutes, in order to ascertain what the effect is going to be. The effect of legislation is often miles from the purpose people had in mind.

This is something that I know the honourable senators are well aware of and the point I am getting at is that there are two balancing considerations and in my submission the negative side of freedom of the press has been so over-emphasized that they have ignored the positive side and that this bill goes so far that it will substantially ruin the positive benefits that we get from freedom of expression in this country.

Senator Urquhart: Mr. Chairman, might I ask Mr. How...

The Chairman: Senator Urquhart has the floor.

Senator Urquhart: Would this legislation, if it is enacted into law, affect the activities of the Jehovah's witnesses across Canada?

Mr. How: That I could not be sure of, sir. I would think this, that this legislation is so vague and indefinite that it would place in the hands of every Crown prosecutor the power to prosecute many people for saying things which are in no sense a danger to anyone, because it is so indefinite. It is so indefinite the result is wholly arbitrary legislation. I will come to the line-by-line consideration of it subsequently.

Senator Urquhart: I am asking you this now to clarify the point in my mind. So you cannot give me a definite answer on that?

Mr. How: Sir, what a prosecutor is going to do I cannot say, but I will tell you this, it would certainly be a danger to every newspaper editor, to every public speaker, to every politician and to Jehovah's witnesses, and to anybody who wants to get up and deal with a controversial issue of the day. This would be a pervasive threat.

Senator Urquhart: So you say.

Mr. How: Not what I say, sir; that is what the legislation says.

Senator Urquhart: No, that is how you are interpreting the proposed legislation.

Mr. How: That is how I read it.

Senator Urquhart: You are a solicitor for the Jehovah's witnesses, are you?

Mr. How: That is right.

Senator Urquhart: In reading your brief you name is just W. Glen How, Q.C. on the front.

Mr. How: Yes.

Senator Urquhart: And at the end you say respectfully submitted, W. Glen How, Q.C.

Mr. How: Sure.

Senator Urquhart: Now, we do not know who you are acting for, whether you are submitting this brief on your own behalf?

Mr. How: I am.

Senator Urquhart: Are you acting for the Jehovah's witnesses and being paid to prepare this brief?

Mr. How: I am not; I prepared this document and spent my own time at my own expense because I am thoroughly concerned about the damage that I think can be done by this legislation.

Senator Urquhart: But you prepared it yourself?

Mr. How: I sure did.

Senator Urquhart: Now, the other thing I would like to ask you...

Senator Lang: And he is not acting for Jehovah's witnesses; is that clear?

Senator Urquhart: He said he is the solicitor for them.

Senator Lang: He said he is not acting for Jehovah's witnesses before this committee.

Senator Urquhart: He said he is the solicitor for Jehovah's witnesses.

Mr. How: That simply explains, senator, the background of my special knowledge in this field, because of the litigation I have been engaged in over 25 years, but I am coming here to deal with it from the standpoint of a practising barrister.

Senator Urquhart: But you are the solicitor for them?

Senator Lang: I am the solicitor for the CPR.

Senator Urquhart: I know.

Senator Lang: But that does not mean that every time I get up I am acting for the CPR. I think it is a very improper implication coming from a fellow member of the bar, Mr. Chairman.

Senator Urquhart: You can draw your own inferences, Senator Lang; I think your comments are very improper.

Senator Haig: I would like to indicate here to the members of this committee that Mr. How is the counsel for a client which happens to be Jehovah's witnesses. Now, he has come here with his own knowledge of the problem affected here as his own personal advocate.

The Chairman: And may I add at his own expense; am I right in that?

Mr. How: Yes.

Senator Walker: And with the reputation of being one of the great counsel of Canada.

Senator Urquhart: Mr. Chairman, I want this to be perfectly clear: I was not casting, and I want to make it perfectly clear, I was not casting any reflection on Mr. How's ability; I just wanted to clarify the point whether he was acting for Jehovah's witnesses.

Now, if I may be permitted to ask one other question. All through the brief it appears to me that his case was built around the persecution that has taken place against the Jews over a long period of years. Now, I want to know why he has tied his own case, the case for the Jehovah's witnesses or any other organization, particularly to the Jewish problem.

The other comment I would like to make is this...

Mr. How: Might I answer you, sir? You asked a question. May I answer you?

Senator Urquhart: Yes, certainly you can answer.

Mr. How: Yes; I want to make it clear that I am not appearing as counsel for the Jehovah's witnesses; I am appearing for myself. I have said that already, but I want to make it clear on the record.

The next thing you asked is why I discussed the matter of the Jewish persecution

in the course of this. The answer is very simple. This bill was brought in on the basis of the Cohen Report; the Cohen Report is wholly talking about the Jewish persecution and therefore the supporting evidence surrounds that.

Senator Phillips (Rigaud): Would you like to leave those words in your remarks "wholly deals with the Jewish question"?

Mr. How: Yes.

Senator Phillips (Rigaud): Is that your responsible statement after reading the Cohen Report?

Mr. How: Well, thank you, Mr. Senator; I will say that it is 90 per cent dealing with that.

Senator Phillips (Rigaud): Yes; now, how would you weigh percentages? In terms of numbers of pages or subject-matter dealt with in the report when you say 90 per cent?

Mr. How: Senator, I will be happy to sit down with you...

Senator Phillips (Rigaud): Is it on weight of pages or subject-matter dealt with in the Cohen Report?

Mr. How: May I answer, sir, or do you not want an answer?

Senator Phillips (Rigaud): Sure I want an answer; that is why I put the question.

Mr. How: I will be glad to sit down with you when this committee is finished and go over the pages with you line by line, but right now there are other, more important things that I want you to hear.

Senator Phillips (Rigaud): In other words, you do not wish to answer my question?

Mr. How: I have answered.

Senator Phillips (Rigaud): You answer by not answering it.

Mr. How: If that is your opinion, you are entitled to it, sir.

Senator Walker: I enjoy these questions, but I hope we will have the chance to hear the witness through.

The Chairman: Just before you take up another matter, Senator Phillips asked you what was in the Criminal Code upon which you relied in the case of somebody advocating the murder of everybody with brown curly

hair. I find that in section 160 of the Criminal Code, which I have before me, it says "is guilty of an offence punishable on summary conviction." If, therefore, you will turn now to section 694 (1) of the Criminal Code, it reads this way:

Except where otherwise expressly provided by law, everyone who is convicted of an offence punishable on summary conviction is liable to a fine of not more than \$500 or to imprisonment for six months or both.

So that advocating murdering people with curly hair might bring you the extreme penalty of six months.

Mr. How: Yes, that is right. May I just say one thing further concerning the point made by Senator Urquhart: In my respectful submission to this tribunal, and I have already said this in print, the reason that I am concerned about the position of the Jewish people in particular in relation to this is that as has already been established in evidence before this committee, the Canadian Jewish Congress has been asking for legislation of this kind since 1953.

Furthermore, as was evidenced by the previous witness here this afternoon and by repeated comments in the Cohen Report, what is really happening in this overall situation is that people are trying to point to what happened to the Jews in Germany and to use that as a basis for trying to make new laws in Canada. My point in answer is simple enough: When you begin to find that situation here it will be a good time to deal with it, but we are so far from it that I feel it necessary to pinpoint where this real argument is coming from in order that the geographical location will become evidentially irrelevant.

Senator Cook: You are quite right if one refers to what happened to the Jews in Germany. That is the worst case and it is an easy one, but there are lots of persecutions that happen in the world against Negroes and many other people.

Senator Lang: Against Jehovah's witnesses.

Senator Cook: Yes.

Senator Walker: There were four people in 1955 who were offenders: Arcand, Taylor, Beattie and Thompson. Are any of them left, except Beattie, and he is in the hospital?

Mr. How: Those are the four people that are mentioned in the Cohen Report. Of those

four people Adrian Arcand is dead; Taylor has defected; I believe Beattie is in the hospital, and this fellow Taylor is still operating out in the country near Toronto, at Gooderham, Ontario.

Senator Urquhart: Mr. Chairman, getting back to Mr. How's reply, he said that the request for this legislation came from the Canadian Jewish Congress and other interested groups, and his brief certainly is centered around the atrocities that were perpetrated on the Jewish people, but he comes before this Senate Committee today opposing this very legislation.

Mr. How: Because this legislation will not help.

Senator Urquhart: Let me finish.

Mr. How: I am sorry, sir.

Senator Urquhart: Coming before this tribunal today, or this committee I should say, condemning this very type of legislation which actually would support the very answer that you gave me in rebuttal to the question that I put to you.

Mr. How: Sir, that may be your judgment.

Senator Urquhart: It is my answer, it is the answer you gave to my question.

Mr. How: The answer to your question as far as this legislation is concerned is that it will not help anybody; it will damage minorities and majority alike.

Senator Urquhart: That is what you think.

Mr. How: That is what the legislation proves. May I go on?

Coming to page 7, I draw to your attention the comment of Mr. Justice Jackson in the middle of the page:

The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all...

Coming down further, to the bottom of the page, Rand in the Switzman case:

...The aim of the statute...

That is the Padlock Act of Quebec:

...The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities.

That was the purpose of Duplessis' legislation, to protect people from their thinking propensities, from dangerous ideas, and that I respectfully submit is the same fundamental basis of this legislation.

Senator Cook: On that point there is similar legislation to this in other countries, is there not?

Mr. How: In some other countries, sir, yes.

Senator Cook: There is in the United Kingdom?

Mr. How: That is true.

Senator Cook: Can you give us any instances where that legislation has operated to throttle free discussion, to throttle the newspapers and generally act in a reprehensible way?

Mr. How: There is one case that I have read about; this is the same one that is referred to several times here. Professor MacGuigan referred to it, I think. Osborne is the name of the case and the facts, as I understand them, are that before the man got to say anything he was arrested on the ground that what they thought he was going to say was likely to cause a breach of the peace. Now, I ask you, sir, who put a...

Senator Cook: What happened after that?

Mr. How: After that I understand he was convicted on the ground that perhaps...

Senator Urquhart: That he said nothing.

Mr. How: As I understand it.

The Chairman: Was there an appeal on that case?

Mr. How: All I know about the case is what I read of the facts in some of the committee proceedings here.

The Chairman: That has no application whatsoever to the bill that we have under discussion.

Mr. How: Sir, with great respect...

Senator Lang: Mr. Chairman, the case to which the witness is referring is an English case under the Race Relations Act.

Mr. How: Yes. Senator Cook was asking me if I knew of any cases under that act and that is the only one that I can think of.

If I may continue these propositions, the cases that I have submitted that establish this

proposition that I am especially concerned about, which is that in worrying about possible damage we ought to take the balanced view that Mr. Justice Brandeis did and not be carried away with concern for the bad things that people might say. People say bad things and very often there is a backlash; instead of convincing all they do is bring enmity against themselves. My basic proposition is in balancing these two interests do not underrate the importance of freedom of expression; that is the substance.

The Chairman: Would you apply that, witness, to libel law and slander?

Mr. How: Libel and slander laws have a place, but it is a very limited place. The defamatory libel section in the Criminal Code has not been used for years and years; it is simply not being used.

The Chairman: But it is there to be used.

Mr. How: It is there to be used, but it has no great relevancy to our society or it would be used a little more.

The Chairman: I was referring more to civil actions, at least that was in my mind, than the criminal one, but the criminal is there nevertheless. Do your remarks not apply to the civil remedies that one has when he is an individual and where free speech is used to malign him untruly?

Mr. How: No, the civil libel laws in this country have never seriously damaged or inhibited freedom of speech as far as I can see. I have no objection to them; we have got them. The country is developing, there is plenty of freedom of speech, so I do not see how the libel laws have damaged us.

The Chairman: If you do not object to our slander and libel laws, which limit free speech in that way, why do you draw a distinction between slandering and libelling groups?

Mr. How: But, sir, this is not civil law we are talking about; this bill is talking about putting people in prison if you say something that anybody thinks is a libel or a slander.

The Chairman: The criminal libel provisions of the Code provide penalties of that kind too.

Mr. How: That is correct and they are not used and I think it is fairly obvious why they are not used, because people believe in free-

dom of speech these days and they have fallen into desuetude because nobody, I suggest, would take very kindly as a rule to defamatory libel actions on behalf of individuals; that is why they do not take them.

Senator Phillips (Rigaud): Are you supporting the reasoning that because they are in the Criminal Code therefore people are more careful?

Mr. How: I do not believe so.

Senator Phillips (Rigaud): That is not your line of reasoning?

Mr. How: I do not believe so.

Senator Phillips (Rigaud): Do you feel that they are falling into desuetude simply because they are dying of old age and not because they are warning people that they are there?

Mr. How: No, I do not think so. Would you say, Mr. Phillips—

Senator Phillips (Rigaud): Do you think that there would be the same situation in Canada if there were no provisions in the Criminal Code dealing with defamatory libel and slander?

Mr. How: Yes.

Senator Phillips (Rigaud): You think we might as well repeal those sections?

Mr. How: Senator, a law that is not used is obviously not serving any great function, is it?

Senator Phillips (Rigaud): Are you suggesting that because people are not charged with murder, because there are no murders, therefore the section in the Code dealing with murder should be repealed?

Mr. How: But there are lots of murders and they are being charged, so that is an obvious answer.

Senator Lang: You asked for that senator; that was leading with the chin.

Senator Urquhart: Mr. How, is that your candid opinion of the Cohen Report—at the bottom of page 8?

Mr. How: Yes, it sure is. The Cohen Report pays lip service to freedom but in fact has built up a bogey.

Senator Urquhart: Freedom of the press?

Mr. How: Yes, freedom of the press. In fact, it has built up a bogey of public concern with virtually no evidence to support it; that is exactly my opinion.

Senator Urquhart: That is your own personal opinion?

Mr. How: That is the opinion which is supported by the report, and I am going to deal with the report in detail as I progress along. That is my position. I will deal with the specific terms of the report as we go along.

May I come now to page 11, where I have set out sections of the Criminal Code. First, on the subject of right of expression, we come to seditious words at the bottom of page 11. You will see that this is confined to that which publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada. Now, that specifically talks of a governmental change, but if people begin to advocate violence, for example to murder, using violence to force the government to get rid of all the people with curly hair, or something of the kind, then it certainly would come right within that statute.

The Chairman: Is that not a limitation on free speech?

Mr. How: Of course it is. I do not say there should be no limitation on freedom of speech. All I say is we have got plenty right now; why make more?

I may say one thing: the Cohen Report keeps repeating time after time, "Well, you cannot say that there ought not to be any limitations on free speech." Nobody in Canada ever said so. So they keep on firing salvo after salvo at a non-existent strawman. Nobody has ever alleged in this country, to my knowledge, and certainly I never have, that the government has no power to limit free speech.

I come now to section 61, which is the exception section under sedition at page 12, at the bottom. This also would be available in some of these circumstances. This is unlawful assembly:

An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable

grounds, that they will disturb the peace tumultuously, or will by that assembly needlessly end without reasonable cause provoke other persons to disturb the peace tumultuously.

Now, some of these public speeches could under the right facts and circumstances be declared illegal under section 64. Section 65, of course, is the riot section. It goes a little further.

Then mailing obscene matter. This has already been held by the decision of Mr. Justice Wells and those sitting with him on the Postal Committee, or whatever the tribunal is called, that the literature being mailed out by Mr. Stanley was in fact illegal within the meaning of section 153 and was properly prohibited through the mails. So there is a decision that already holds some of this activity to be illegal under the Criminal Code.

The Chairman: And are you in favour of it?

Mr. How: Yes.

Senator Lang: Do we need any more than that section?

Mr. How: I would say certainly not; we do not need any more. Why not make effective use of what we have?

There is plenty of law right here. Under section 160, I have already given my view that in some circumstances some of these speeches or this insulting language could very well be convicted under that section.

Now we come to another one that in my submission opens the door to prosecution of some of these publications, which is section 166, spreading false news:

Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence...

Certainly denouncing a group or threatening a group of people and disturbing other people is a public interest. There is no question about it. People who do this by distributing false material can be convicted under that section, and in my submission quite a number of these documents could quite readily be caught under that section. Again no effort has been made to apply it.

We come now to the blasphemous libel section, section 246.

Senator Walker: Does that cover the *Protocols of Zion*?

Mr. How: I believe the *Protocols of Zion*, Senator Walker, could very well be caught under section 166, spreading a false statement or tale, and also under the blasphemous libel section.

The Chairman: Is there any interpretation of this public interest?

Mr. How: No, there has not been yet, sir, because no cases have occurred. The only case to my knowledge of that is a case that took place in Saskatchewan or Alberta in the early part of the century where an American who was a little disgruntled with his position in Canada set up a sign saying "Settlers not wanted in Canada, do not settle here." This was at a time when the Immigration Department was trying to get settlers into Canada, so they prosecuted him. So that must have been considered contrary to the public interest, and I would think that really if something of this kind was put before the courts that the courts would take a very broad and sensible view of what is the public interest.

Certainly you would have a hard time on the opposite side of saying that much of this drivel has any reasonable support or any public interest on its side.

I have come to blasphemous libel.

Senator Walker: That is section 246, subsections (1) to (3) of the Criminal Code?

Mr. How: Right. If I may pause before going on to the blasphemous libel section, I draw to your attention to subsection (3), which says:

No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.

It should be "any opinion". I believe that is an error. The point is that in your defence under this section is good faith, in decent language or establishing by argument. Therefore these accusations, some of which are against the Jewish religion, which nobody could pretend were in good faith or decent language, would have no protection under subsection (3). They might very well be convicted under the blasphemous libel section.

Again no effort has been made to use the Criminal Code to employ that which we already have.

Coming now to the defamatory libel section.

The Chairman: But you know this is confined to a religious subject, not to people who hold a religious belief.

Mr. How: That is true, but the *Protocols of Zion*, from what somebody has told me about it—I have not read it—is a book that is considered highly objectionable and which talks about the Jewish religion—these old wild stories about using the blood of murdered Christians for part of the rites of their religion. Well, now, that is a terrible thing for anybody to say. I do not think anybody in his right mind is going to read it, so if he has published that stuff he certainly would not have any defence under subsection (3). I keep coming back to wondering well, why have they not been prosecuted?

Now we come to the next part, under defamatory libel.

Senator Walker: Would this grab hold of Beattie and the Bell Telephone business? Where does he come in under this? Have you got anything to cover Beattie, who has those terrible broadcasts?

Mr. How: First, as far as Beattie is concerned, I would suggest that his speeches in Allan Gardens could quite possibly have been convicted either under section 54 or section 160.

As far as the telephone record that he had, and which was discussed at some length before this honourable committee, the answer to that is very simple. The only people that are going to hear that telephone call are those that call and want to hear it. It is not being broadcast to all the people and, as a matter of fact, if so much publicity had not been given by his opponents the chances are that himself and several other people would be the only ones that would know about it and, indeed, nobody I suggest with any intelligence would be listening to it anyhow.

But there is another answer to that, which is very simple. The Bell Telephone cancel service which is being used for obscene language and for unlawful purposes, and I suggest the Bell Telephone Company could very well cancel Beattie's service and put the onus on him to go to court and try to get a *mandamus*.

Senator Walker: The Bell Telephone sent their vice president to say this could not be done. Have they ever tried to do it?

Mr. How: As far as I am aware they never tried it. I read his evidence very carefully and he did not suggest they ever tried it. That is just the problem, Senator Walker. There is plenty of recourse here and nobody seems to be trying it. They are all holding back, trying to dump the burden on Parliament and on this committee to look after them.

Senator Walker: What do you suggest we should do about Beattie? That is bad business. I would like us to ignore the Beattie affair.

Mr. How: As far as Beattie is concerned, I think it should be drawn to the attention of the Bell Telephone Company that the very type of material he is putting over the telephone has already been held in the Post Office inquiry to be illegal under the Criminal Code, and that the telephone company is in violation of its duty when it cooperates in supplying service which is a violation of the Code. It would be their duty to cancel the man's service and then wait and let him try and reinstate it. In other words, there are practical ways of dealing with this if they want to try it.

Senator Urquhart: Who bells the cat then?

Mr. How: The Bell; the Bell has got the bells if they feel free.

The Chairman: Have you read the judgment handed down by the magistrate in the Beattie prosecution?

Mr. How: Which one, sir? There have been several.

The Chairman: The important one was when he met in the park and was charged before the magistrate.

Mr. How: Charged with what, though? Excuse me.

The Chairman: He was charged with violating a bylaw; the magistrate held that there was nothing in the code that enabled the prosecution of that man at that time.

Mr. How: But the point is that the so-called code he was charged under was a city bylaw; it was a city bylaw code, not the Criminal Code they were talking about. It does

not take a very good student of the law to reason that it was not a bylaw that ought to have been used in that case; it was the Criminal Code.

The Chairman: But the magistrate went much further than that; he said that there was nothing in the Criminal Code under which he could be prosecuted.

Mr. How: The magistrate is entitled to his opinion, sir, and if he gave me that opinion, sir, I would promptly go to appeal where I could get a more authoritative decision.

Senator Walker: He was finally convicted, was he not, of something?

The Chairman: That was later on.

Mr. How: He was acquitted in that case because I believe that later on Mr. Justice Hartt held that the bylaw was inapplicable, and he was perfectly right. The proper control of these things is under the Criminal Code, and there are lots of sections there. All it takes is a little ingenuity.

Senator Walker: What section could he have been convicted under?

Mr. How: He could have been very readily convicted under two of those sections that we have discussed already: unlawful assembly and section 160, causing a disturbance. If he finally got down to it and began to publish a statement, tale or news that he knew was false he could have been caught under section 166. If he went too far against a specific group he could very well be trapped under section 248, under defamatory libel.

In that regard I am reminded that the argument under this section has always been, "Well, the Jews as a class could not take action under section 248." With great respect I am not wholly convinced of that and there is a case against it, which is the case of *Ortenberg v. Plamondon*, a case taken in the City of Quebec.

Senator Choquette: We were told about that by one of the witnesses; that is the case dating way back to 1913?

Mr. How: That is right.

Senator Choquette: Where somebody had made a certain speech against Jews and there were only a few in Quebec City?

Mr. How: Yes.

Senator Choquette: So it was just like identifying a group who went and broke windows.

Mr. How: That is true.

Senator Phillips (Rigaud): Mr. How, may I just put one question to you? It arises out of your reference to section 166 at the bottom of page 13 of your brief:

Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury...

If I followed your reasoning in the *Whitney v. California* case, quoting Mr. Justice Brandeis, you pressed the point that an expression of opinion should not be a crime unless we think there is actual incidence of the crime it is time enough to deal with it when we are facing the crime.

Mr. How: That is right.

Senator Phillips (Rigaud): One of your objections to the bill as drafted was that it projects itself into the future from the point of view of an incitement or an expression of opinion that may lead to something.

Mr. How: That is right.

Senator Phillips (Rigaud): Do you not have in section 166 a precedent there for a crime resulting from the statement that does not commit injury but is one that is likely to cause injury, and does that not invalidate considerably the emphasis that you have placed in your treatment of that *Whitney v. California* case, aside from the references that I made to incitement and other factors already quoted by me in the Justice's opinion?

Mr. How: May I answer you?

Senator Phillips (Rigaud): Of course; I am not trying to embarrass you. I am just trying to enlighten myself and my fellow senators.

Mr. How: I appreciate that. Senator Phillips and other honourable senators, this section already goes further than good law requires, and the mere fact that there is a precedent—there are lots of bad precedents in the law. That is why we have learned senators like yourselves to review it from time to time and try to straighten it out.

Senator Phillips (Rigaud): So, in other words, you consider section 166 as law badly drafted?

Mr. How: That one particular item, yes.

Senator Phillips (Rigaud): You have answered me. I do not agree with you, but you have answered me.

Mr. How: Senator, that is the advantage of a free state; we have a right to disagree with each other.

Senator Phillips (Rigaud): You are consistent in conforming to your position that you can only rationalize it by saying that section 166 is bad law.

Mr. How: With great respect, sir, that is not, I submit, a fair summation. I will tell you this: When you stick to the proper principles of law, then some of these things fall on one side or the other. It is not my position. It is the position that good law requires, and I am obliged to stick to that and I hope to stick to it.

Coming now to page 14, defamatory libel, section 248, my point is, and I was assisted by the learned Senator Choquette, that it has always been thought that this section could only be used by an individual and not by a group. I suggest that the *Ortenberg v. Plamondon* decision puts a question mark around that. I will give a further situation, to take an example such as Beattie. I do not know what he said. Let us assume he makes a speech to this effect: he is surrounded by people and among them are some Jews and he says, "You Jews are no good to Canada. You ought to run out of the country"—and the usual diatribe they get off with.

Now, there is a group of people right there. They are the ones affected, and certainly that statement could very well be a defamatory libel against an individual in that group. Of course, a libel has to be written, but let us assume a situation where it is something written, and written to a limited and definable group.

The Chairman: It would be slander; it is not libel.

Mr. How: Oh, yes, it would be slander, but this is only limited to libel in this section.

Then we come to section 366, intimidation. This is something where I have myself prosecuted some people who have made threats against Jehovah's witnesses in different parts of the country. This is a very useful item for any minority that finds itself threatened. It is quite a useful section of the Code, and while we do not have all this man's words in front of us, you know perfectly well that if you let

one of these wildeyed rabble rousers just talk for a while he will talk himself behind bars. The mistake is made in not letting him talk; let him talk first and then, once he has said it, it is time enough to move. They have moved too fast.

Next we come to obstructing a person in the use of property. This is a broad section in the Code:

Every one commits mischief who wilfully obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property.

That is a very, very broad statement. Let us suppose that a Jewish person is in his own home and somebody comes and shoves through the door, or hands him, or otherwise, one of these documents, puts it in his home, saying that the Jews ought all to be killed, or some of these other terrible allegations. I think you might very well find this section quite useful.

The point is this has not been tried, but these broad sections open plenty of scope to put a stop to these things.

Senator Walker: Are there no cases to find redress under any of these sections?

Mr. How: Not to my knowledge, sir.

Senator Cook: I must say you are not impressing me by all the time referring to the fact that the Jews do this, the Jews do that, or the Jews do something else. Other minority groups will be affected by this legislation.

Mr. How: Sir, with great respect, I am not trying to pick on any group, but the hate literature that has been put in the Cohen Report is practically all against the Jews. That is why I am dealing with it; this is the target area.

Senator Phillips (Rigaud): I think that is a pretty good expression, the target area.

Mr. How: Yes, I appreciate that.

Senator Phillips (Rigaud): It is very dramatically put.

Mr. How: That is why we are talking about it; we have to deal with the reality of things.

Senator Phillips (Rigaud): Targets are usually associated with the use of rifles.

Senator Urquhart: That comes back to my original comment, that everything seems to revolve around the Jews.

Mr. How: I did not write the Cohen Report.

Senator Urquhart: You wrote this.

Mr. How: I wrote this, not the Cohen Report.

Senator Phillips (Rigaud): We are not talking about that; we are talking about a bill, not the Cohen Report.

Mr. How: Section 407 deals with counselling offences; section 408 deals with conspiracy; section 717 allows us to take proceedings if we fear that another person is going to cause personal injury.

Then, under section 22, at the bottom of page 16, is counselling offences. It is my respectful submission that there is plenty of law in the Criminal Code and it should be used.

Senator Walker: You refer to counselling offences under section 22?

Mr. How: Yes.

Senator Walker: That is pretty broad, is it not?

Mr. How: Very broad, very broad; counselling any illegal action against any group of people whether they are curly headed, black haired, black skinned or otherwise.

On page 18 is an important decision in the United States Supreme Court because it points out that it is not only what is done under a statute that is a danger to freedom of the press, but that a broad, vague and uncertain statute is itself a constant menace to people who may have important things to communicate. They have struck down this statute in this case as being unconstitutional, not because it was used but because of the pervasive threat, or what they call the chilling effect.

In other words, the duty of the law in a democracy is to keep the door open. We want people to talk; we want to get the value or otherwise even of their opinion. At least if their opinions are as bad as some of these people, at least we will know who they are, but once you shut them up you just give them the glamour of an underground movement and it helps them.

I come to section IV, beginning at page 19. I would like to telescope this, because we are running over time. First may I draw your attention to page 20, and this passage from *May's Constitutional History*:

The law of sedition which covers the area of freedom of expression was so

loose and so uncertain that the result was that every one was a libeller who outraged the sentiments of the dominant party.

In other words, an uncertain law is a continuing threat to everybody.

Now, that was the law in this country up till the *Boucher* case. I set out the old Star Chamber Regulations on page 21. Then on page 22 I come to what I regard as a key point. Professor Chafee in analysing the *Burns* case, that is the old definition used up to the *Boucher* case:

...is so loose that guilt or innocence must obviously depend on public sentiment at the time of the trial.

Now, here is the point. When law is so loose that you do not have to point to any wrong a man did and all you have to do is to rely on public sentiment, does it not become obvious that you cannot have law so loose and uncertain that it wavers back and forth with public sentiment? That is what happens when you have vague and uncertain laws. That is why in the *Boucher* case this old law's vagueness was struck down.

I turn now to page 23. Mr. Justice Rand points out that the old law talked about ill will, and as he says at the middle of this quotation:

—what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions;

In other words, the point is that when you are dealing with a human emotion the law cannot reasonably or specifically make a clean distinction of human emotion so that we can decide at what point it crosses over from criticism to disapproval, to ill will or to hostility, or to contempt or to hatred. How are law courts going to determine anything as uncertain as that? When you start putting this sort of thing in front of the courts you get back to what Chafee said, "Guilt or innocence is just a matter of public sentiment." That is the effect of loosely drafted legislation.

Now, Mr. Chairman, I would like to come specifically to this legislation. My further analysis of the Cohen Report I have put under Part V on page 24. If you wish, I can do that or I can come back another day and discuss the rest of this matter. I will leave myself in the hands of the committee.

Senator Walker: Could I move that they be included as part of the record if the witness does not have time to finish dealing with them here?

The Chairman: As I understand it the witness is filing this memorandum with us.

Senator Walker: I would like to see it as part of our proceedings because if he had time he would give it all to us today. I would like to see it as part of our record.

Mr. How: I would like to present it and have it filed.

Senator Walker: If that suits the chairman and the other members of the committee.

The Chairman: I would not mind putting in certain parts that the witness would like to have in, but it is rather a long memorandum to print.

Senator Lang: I think the witness is referring to Part V and not to the whole brief.

The Chairman: That is Part V on page 24. How long is that?

Mr. How: I would like to put in pages 24 to 39.

Senator Walker: We do not need those examples, do we? They are mainly newspaper reports.

The Chairman: No.

Mr. How: I think the examples are very pointed because they point out that the publicity these people get helps them more than any of their leaflets, and it demonstrates also that it is balanced common sense which is the quickest way to put a quietus on this thing.

Senator Walker: Before going further, could we have a ruling from the chairman?

The Chairman: I do not like to take so much space in the record.

Senator Lang: We have taken lots of space already.

The Chairman: That is true. It is a long record.

Senator Cook: If you put page 30 in, would that be sufficient?

Mr. How: Yes.

The Chairman: Pages 24 to 30.

Mr. How: Then I would like to have pages 33 to 39 in the record also. They are quite useful.

The Chairman: But we cannot publish newspapers in our record. We will put in from page 24 to page 30 inclusive.

Senator Walker: And then to page 39?

Mr. How: Pages 33 to 39?

The Chairman: And pages 33 to page 39.

Mr. How: We are omitting pages 31 and 32?

Senator Walker: I agree with the chairman. We can get too much of this. We shall put in up to page 30 and then pages 33 to 39.

Hon. Senators: Agreed.

[For text of Mr. How's memorandum, see Appendix]

Mr. How: Now I would like to come down to the details of the bill. Section 267a says:

Everyone who advocates or promotes genocide is guilty of an indictable offence . . .

Now, everyone who advocates genocide is already guilty of an indictable offence by counselling under sections 22, 407 and 408 of the Criminal Code. So this adds nothing; it is just repetitive and useless legislation.

Senator Walker: In other words, there are three sections of the Code that provide what the proposed section 267a proposes to do; is that correct?

Mr. How: Subsection (1).

Senator Cook: If the two sections of the Code do not provide, you have no objection to that being in there, though?

Mr. How: I would still object. I do not think that advocacy *per se* ought to be an offence, for the reasons outlined by Mr. Justice Brandeis.

When it gets to incitement, then it is time for the Criminal Code to take effect. May I illustrate? You will recall the words of Professor MacGuigan. Among other things, as I recall his testimony, he said that this could not even be discussed in a private home. It is not only a private statement but it is made in even a private home, and I say that when the Criminal law of this country starts tuning in on private conversations in private homes then we are getting to be too much like the thought police. When they do something in

public, then they are going to be caught under one of these sections. In your private home let the people have any opinions, good, bad or indifferent. The crazier people's opinions are, the fewer people they are going to convince, so let them talk; it has its own solution in many cases.

Now I come down, if I may, to subsection (2). This in my respectful submission is extremely dangerous because of its vagueness. First it says that while genocide is the selling point, that is not what it says after that, because it says:

.. any of the following acts committed with intent to destroy in whole or in part any group of persons:

Now, what is any group? Let me illustrate. Are the Roman Catholics a group? If I say that you ought to leave the Roman Catholic Church, it is not for your benefit, or if the Roman Catholic says to the Protestant, "Leave the Protestant Church, you can only get salvation in my church." This is a legitimate area of controversy, but here this may be considered intent to destroy in whole or in part any group because it does not say destroy in what way. Is it destroying by leaving the group? Or if I say do not belong to the Liberal party, or the Tory party in a particular area. Here I have got somebody and I have met a few of them in my time, who were so disturbed, that were so religiously addicted to one party or another, then somebody comes along and says that he told those people to leave the Tory party, he was inflicting mental harm on the members of this group because they got so upset about it.

So you come into court; it is a perfectly legitimate statement but he can be caught under this vague statute, so the result is...

Senator Urquhart: You would have a hard job convicting with that.

Mr. How: Sir, if you read some of the things people have been convicted on...

Senator Urquhart: I know; I am talking about what you just said.

Mr. How: Then why do they not specify what "destroy" is talking about? It is so vague it could mean anything. Let us take another example ..

Senator Urquhart: Vagueness is the law in most cases.

Mr. How: Yes, vagueness is the law. It does make for a lot of legal fees, sir, and that is why good legislators ought not to write vague laws; they ought to have something that the people can understand so that they know what they are doing.

Senator Urquhart: Maybe we should hire you as a full-time drafter of legislation.

Senator Walker: That would be a good idea.

Mr. How: As a matter of fact, sir, I would not mind redrafting this legislation and I would do it in about 30 seconds. With the greatest of respect, you have had other good men who have been here and said the same thing.

Senator Urquhart: But not in 30 seconds.

Mr. How: I am just telling you how I would redraft it. Let us take another illustration. They talk about deliberately imposing measures intended to prevent births within the group. Let us suppose a doctor in a certain municipality, in Quebec we will say, believes in contraceptives and many of the local people according to their religion do not. He urges that they should do this, and somebody comes along and says, "Well, you know that at some remote time in the future this group is going to be destroyed by preventing births within the group." Remember, there is no limitation to time, there is no incitement; it just has to be any time that anybody in the remote future can imagine a tendency.

You all know that people can certainly draw on their imagination when they are out to get somebody. So my submission is that this whole section is very uncertain; it is too vague; it can catch people for perfectly innocent comments.

Further, when you look at it, the law as we draft it surely has to be related to some fact of life. So where have you got anybody deliberately inflicting on a group conditions of life calculated to bring about its physical destruction? Where have you got forcible transferring of children from one group to another group? Do you want to convict the Government of British Columbia for putting the Doukhobor children in school?

The Chairman: You know that this does not apply to that.

Mr. How: Then what have we got it in here for? What are we talking about, senator? That is just the point. We are writing legisla-

tion absolutely in the air, having no application to the realities of life in Canada in this year 1969.

Gentlemen, you busy men in this Senate know perfectly well that there are lots of real and present problems that need to be dealt with, instead of going around imagining situations that do not exist in order that we can write law to cover something that might happen some time and probably never will happen.

Senator Urquhart: May I suggest that you might be imagining a lot of situations too?

Mr. How: Senator Urquhart, I have tried a lot of these cases; with great respect, you have not.

Senator Urquhart: I have tried a lot of these cases.

Senator Walker: And he is a very able counsel and also the leader of a party in his own province, so I stand behind him.

Mr. How: I did not mean to impugn your ability, sir; I am just saying that in these types of cases you find some pretty weird types of arguments being made by prosecutors. Really a vague, indefinite statute is a prosecutor's delight; he can just prosecute anybody he does not like. That is the history of repressive legislation; it has always been used by oppressive government to silence people who usually had a too-pointed criticism to make. That is the history of this type of legislation.

Senator Walker: Are Spain and Portugal a good example of that?

Mr. How: Spain is a good example; Hitler's Germany was a good example. The reason all these things could happen was that they had no free press, they could not answer.

Portugal and Russia are good examples; Czechoslovakia as of today is a good example. There are lots of examples. Every totalitarian country tries to muffle criticism, and very often it is by vague, indefinite laws left to be misused by the majority in power.

Coming now to section 267b on the next page, we are talking about:

Every one who, by communicating statements in any public place, incites hatred or contempt against any identifiable group where such incitement is likely to lead to a breach of the peace,...

Now, it does not say likely to lead to a breach of the peace against whom. Suppose I make a statement that is very unpopular, and a mob of other people come and attack me. Now, tell me, do we have freedom of speech in this country or do we have freedom of speech only to the point where somebody else is sufficiently concerned to get a mob to attack the speaker?

Senator Phillips (Rigaud): Mr. How, as I understand it you are still on the first section; we are dealing with (a), (b), (c), (d) and (e).

Mr. How: Sure, I came over to the next section.

Senator Phillips (Rigaud): The last one:

...forcibly transferring children of the group to another group.

You used the British Columbia instance, and so on. Are you not overlooking, as a lawyer, the fact that (a), (b), (c), (d) and (e) must be read in the light of clause (2), where it says:

In this section 'genocide' includes any of the following acts committed with intent to destroy in whole or in part any group of persons:

Under statutory interpretation the acts contemplated by (a), (b), (c), (d) and (e), which are in some instances admittedly broad, must relate themselves to sections (1) and (2) in order to make sense.

You do not need to make sense in (a), killing members of a group, but when you get to the question of causing serious bodily or mental harm to members of the group, admittedly if you refer only to mental harm and you left that alone, but it has to be related to the concept of genocide. Genocide is described as acts committed with intent to destroy in whole or in part any group of persons.

Now, once you get the fundamental direction given to the section that the purpose thereof in order that it constitutes a criminal offence is that there must be present intent to destroy in whole or in part a group of persons, your argument with respect to vagueness falls to the ground, surely?

Mr. How: With the greatest of respect, sir, "destroy" is left in such an uncertain state that it can mean practically anything.

Senator Phillips (Rigaud): Surely in the English language, or the French language—to take the English language, do we need any-

thing more specific than the statement intent to destroy?

Senator Lang: Yes, senator; the more specific word to be used there, which was intended and I suggested it before, is "kill".

Senator Phillips (Rigaud): I am thinking of the broad aspect when you take a subsection other than the relationship to sections (1) and (2), and there your whole argument falls to the ground. *Cadit quaestio*, as the lawyers say; it falls to the ground because you have the clarity and position of the intention to destroy, in whole or in part, any group of persons.

My heavens, I have been reasonably familiar with the English language since I was five years old and I think I know the meaning of the words "to destroy a group of people."

Senator Lang: Is there anything wrong with the word "kill"?

Senator Choquette: In the French text it is "*le fait de tuer*."

Senator Phillips (Rigaud): In French, as my learned friend Senator Choquette, my colleague at the bar, points out, it reads "*le fait de tuer*", the intent to kill.

Mr. How: Then let us put "intent to kill".

Senator Phillips (Rigaud): As a matter of fact, you know perfectly well it is a reasonable interpretation. If there is any doubt in the mind of the court, the court will take the two versions in order to get the intent.

Mr. How: Let us not leave any uncertainty, but go a step further, sir: once you have got them under the counselling section. So the whole value of this just becomes repetitive.

Senator Phillips (Rigaud): That is a different point. I am trying to get it into the record that the point you made previously may or may not have validity. The defences may have validity; I personally think they do not, but that is beside the point for the moment. I am only directing myself to that part of your brief where you are now stating that you object to the bill as drafted because of its vagueness.

The Chairman: Gentlemen, may I intervene for just a moment. It is our practice to adjourn at five o'clock. I am puzzled to know what we should do.

Senator Lang: Let us continue until this is completed, Mr. Chairman.

Senator Urquhart: How long are you going to take, though?

Mr. How: There are two more sections that I would like to deal with.

The Chairman: Could you give us an estimate of how long you will need?

Mr. How: If you can give me 20 minutes.

Senator Lang: I think if we can estimate the time it is going to take for the interruptions, Mr. Chairman, we will know better.

The Chairman: Let us not interrupt the witness too much then and we will make it a limit of half-past five. It is now five minutes past five. Will that be satisfactory, witness?

Mr. How: Yes, sir. Let us go to section 267B:

Every one who, by communicating statements in any public place, incites hatred or contempt against any identifiable group where such incitement is likely to lead to a breach of the peace, . . .

In my submission, the part about likely to lead to a breach of the peace is too open and uncertain. You have to say incitement of hatred or contempt against any identifiable group where such incitement is likely to lead to a breach of the peace against such group. Once you get to incitement then if you are inciting people to attack a group this would become an offence under counselling assault, or counselling an unlawful assembly, or a riot. So again, once you clarify it you find that it is already in the Criminal Code.

Coming down a little further, under subsection (2):

Every one who, by communicating statements wilfully promotes hatred or contempt. . .

We have already dealt with the uncertainty. When do you cross from criticism to disapproval, to contempt or to hatred? Contempt has always been a matter of civil law. Do we not have a fairly orderly society? Where is the situation that says that Canada is in such an uproar we have got to stop people from talking? With great respect, there is simply no foundation, no foundation in fact in alleging that 21 million people are in any way threatened and that the peace of this country

requires these limitations which the very vagueness and uncertainty of makes a ready weapon for abuse.

Now the next bit: they were very proud of the fact that under subsection (a) the statements communicated were true. Now gentlemen, we are all aware that that on paper sounds like a good and an invaluable addition. The whole point is though that in controversial matters you have got certain facts, you have got certain opinions and you have got certain conclusions that you draw.

So the facts are something that you prove; the opinions and conclusions are a matter of opinion. Some honourable senators here of good judgment and information feel that they ought to belong to the Liberals; some other honourable senators, equally honourable and with equal information, think that they ought to belong to the Conservatives. Which is true; which is the truth?

The whole point is you are getting into an area that is largely opinion; the courts are not the forum for debating uncertain matters of intellectual probity and intellectual honesty. You are putting into the criminal law something that quite probably may have value in an educational program, but to say that this is criminal law, this as a proper part of the criminal court I suggest, with respect, is just poor law.

I must say in this connection that I want to draw particularly to your attention the fact that the committee itself talked in large measure about the educational value of the legislation that they are proposing and which is the same legislation here. This is on page 35 of my memorandum. The committee suggests:

Moreover, technical arguments against Canadian implementation do not take into account the educational value of such legislation.

Since when is the Criminal Code a school book? The Criminal Code, honourable senators, sets the low point of human behaviour beyond which we send people to the penitentiary. Since when do we start writing generalized sections in the Code because we think it is educational? This is criminal law nonsense.

Senator Phillips (Rigaud): Do you not regard, Mr. How, the two defences that are indicated, amongst others, are sufficient? The two mentioned are that the person can plead that the statements communicated were true and (b):

That they were relevant to any subject of public interest, the public discussion of which was for the public benefit, and that on reasonable grounds he believed them to be true.

Do you not think that that is a matter for judicial analysis and decision?

Mr. How: Sure it is subject to judicial analysis, but it is also subject to fact and the only time these statutes are ever used against anybody is when they are unpopular. So you find a jury that disagrees with you and the judge says, "Well, do you think it is a matter of public interest?" And the jury says, "Well, of course not," and if the prosecutor did not know that he would not have put the case in the first place.

As a matter of fact, when we had all our cases in Quebec those cases that came before French juries were convicted and the very same document before English juries was acquitted. Does that prove that there was anything wrong with the system? It does prove that we had bad law.

Senator Phillips (Rigaud): It certainly proves that we have to have bilingualism and proper interpretation in the courts.

Mr. How: There was no problem about interpreters, sir, but this was bad law and this is more of it. So it is my submission that this is all too uncertain; similar to an identifiable group is too uncertain.

Also another weakness there is the fact that all a prosecutor has to do is lay the charge. The whole onus is put on the other person. So suppose you are discussing, for example, say, the impact of Roman Catholicism on economics, and you talk about Italy, Mexico and four other places. So you come to prove the truth; what do you do? Bring witnesses from all these places? The point is you are putting in the criminal courts a type of intellectual argument that frankly has no place in the criminal law.

Senator Phillips (Rigaud): In connection with your reference to Roman Catholicism, it must include the ingredients of inciting hatred or contempt and it must lead through such incitement likely to a breach of the peace. Your expression that Roman Catholicism has an effect on economics or does not educate children within the framework of a capitalistic system...

Senator Lang: With respect, that is not true; under subsection (2) there is no breach of the peace required.

Mr. How: It says "likely to lead to a breach of the peace" and "likely" may mean at any indefinite time in the future.

Senator Lang: Under clause (2), as I was pointing out, Mr. Chairman, there is no breach of the peace mentioned.

Senator Phillips (Rigaud): I think you are right, Senator Lang; subsection (2) is broader than the first one.

Mr. How: That is right. Now let me come down to something that is even more completely insupportable, section 267c. Section 267c is a situation where:

A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda, shall issue a warrant under his hand authorizing seizure of the copies.

Now, I draw to your attention that under section 267c there does not have to have been a conviction. We will take a situation where one of you honourable senators in the days when you were running for office discovered that the man in the opposite party committed some serious corruption. You have this material printed for the benefit of the electors. So what does he do? When he hears about it he goes in front of a judge simply on an affidavit, and the judge orders your material seized. It is sized. They hold it until after the date when it is any good, and then say, "Fine, now the onus is on you to come to court to prove your innocence" and you do not even know what you are charged with. This completely reverses the onus of proof, and in my submission is most insupportable from a statutory standpoint.

So that it is my submission further that we have just to come back to it; in summary we have plenty of law. The fact is that this material and its distribution hit a high point in 1964 and has backed off ever since. So when the influence and the effectiveness has

backed off, then the answer is simple enough. What do we want legislation for at this stage of the game? If there ever was any excuse for it, the excuse has disappeared in the meantime.

Senator Walker: You mean if there was a demand then, there certainly is not now?

Mr. How: That is correct, sir.

Senator Walker: Would you answer me this: This committee that wrote under Dean Cohen, had any one of these men ever had any experience in court in criminal law, ever taken a case?

Mr. How: As far as I can understand they were all academic lawyers of no appreciable practical experience; none of them had ever even taught criminal law, and I suggest it has never been shown that any of them ever had any experience in taking any serious criminal case. So they did not have, in my respectful submission, any serious academic qualifications and they did not have any practical experience. They only called one witness.

Senator Walker: Really?

Mr. How: This committee called one witness only and that witness himself admitted that he was not competent to judge.

Senator Walker: What did he say? Do you mean he damned his own evidence?

Mr. How: He did. At page 33 of my memorandum I quote Harry Kaufman's own statement. It is at page 230 of the Cohen Report. You will find it at page 33 of this memorandum. He says specifically:

The writer is not competent to judge the possible legal side effects of legislation applicable to the problem at hand.

So the committee had no practical experience with the criminal law. The witness they relied on admits he is not competent, and when you get to the end of the analysis of the Cohen Report his competence shouts from the record, with great respect.

Thank you, honourable senators.

The Chairman: That was quite a siege. I congratulate you on standing up to it very

well indeed. I am not saying that I agree with you, but I certainly admired your presentation.

Everybody knows the position I take with regard to this bill, but notwithstanding that I am congratulating this witness on his presentation.

Mr. How: I appreciate your kind comments, sir, and I will be more appreciative when I find you registering your vote in the light of what good judgment obviously calls for.

The meeting adjourned.

APPENDIX

MEMORANDUM

The Cohen Report is shallow and impractical and reveals a failure to understand even the function of criminal law in our society. The report strains at the evidence and ignores logic as it travels to its unfounded conclusion.

The Cohen Report is abstruse and strained in its reasoning, shallow and insupportable in its evidence and wholly illogical and impractical in its conclusions and recommendations. While the report deals with criminal law and claims enough special expertise in the criminal field to justify admittedly "newer concepts of law" (58)* in this area, it has yet to be shown that any single one of the Committee members has ever had any practical experience in acting as counsel on even one serious criminal case. None of these law professors has ever even taught criminal law to students!

The highly unrealistic and impractical approach of the Committee brands its report as from an ivory tower, quite out of touch with the cold, reality of life.

Only one witness was called by this superficial study. This was Professor Kaufman whose confused, rambling and needlessly discursive study strains to prove what is well known to every reasonably well-informed high school pupil. Its contradictions make it worthless, yet it is the sole support for many of the Committee recommendations which in consequence completely fall to the ground.

There is one redeeming feature of this report and that is the competent analysis by Professor McGuigan. While he has read and analyzed the cases he has failed to reconcile the decisions by finding the basic rationale that governs this field of the law.

ANALYSIS

(i) Page 6

People came to talk of individual freedom as if it were an absolute right subject to no limits at all.

No one in Canada has ever even made such an argument. It would appear that only one man of any authority in the United States (Mr. Justice Black) has ever even made such an argument in the United States. Nobody who reads our criminal code could even sen-

sibly make such an argument. The Committee sets up this non-existent straw man and proceeds four times in two pages to attack this non-existent argument.

(ii) The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man... The triumphs of Facism in Italy, and National Socialism in Germany through audaciously false propaganda have shown us how fragile tolerant liberal societies can be in certain circumstances.

The foregoing statement frankly plays fast and loose with history. Who seriously pretends that Germany was ever a "tolerant liberal society"? Prior to 1918 Germany was ruled under the Kaiser. The "master race theory" was being pushed down the Germans' throat under Bismarck and the Kaiser and the Prussian junkers class that was in control of German education right up until World War I. There was nothing liberal about Germany during that period and all dissidents and some of their best brains had to escape to the United States. The Weimar Republic only operated in any serious stance from 1921 till 1931. Then the Nazis took over. Germany never had a chance to learn democracy. The country had no tradition of a free press. Equality of treatment for the people was utterly contradicted by the "master race" theory that had always been taught.

Additionally, ever since the days of the Crusades the Roman Catholic church in Europe had taught anti-semitism. Hitler undoubtedly culminated a terrible history. However, his propaganda did not create the situation. He came in at the end of a period of 1500 years of anti-semitism and proceeded to culminate it with a vicious and sadistic conclusion. It is wholly unrealistic to pretend that Hitler in his few brief years built up the German mind and the German intolerance to the dreadful excesses that we have seen.

Italy has always been a land where small pockets of highly developed civilization have been found in certain municipalities but it would be very hard to say with any foundation of fact that there has been over Italy anything that seriously represented a "tolerant liberal" society.

*Page references in this section will be to the Report.

This constant reiteration and emphasis on what happened in Germany really reveals the error of this entire report and development. Instead of looking at the Canadian situation, (where no real problem exists) the Canadian Jewish Congress because of its obsession with Hitler, is trying to get the Canadian government in this year 1969 to legislate on behalf of Germany in 1933-1945. The German problem is not here, there is no clear and present danger in Canada. Why start taking chances on the law of Canada because of what somebody did in Germany?

(iii) How much evidence is there?

The evidence upon which the committee was proceeding was so weak that it had to mention every single document that had ever been distributed in Canada.

On page 18 the Committee admits:

Although the Canadian numbers may be small the effects are likely to be a great deal more dangerous than present numerical estimates would suggest.

Why is it so dangerous? If it is a small number, what effect is it going to have on the Canadian body of politics? No account is taken of the fact that there are also opportunities to reply. No account is taken of the fact that extreme propaganda creates its own backlash. It is an insult to the intelligence of the Canadian people to pretend that there is any real danger from the kind of infantile trash that has been portrayed here. There is a definite social value in knowing where and who is doing these things so that the R.C.M.P. can keep an eye on them.

The committee goes on to say at page 24:

There exists in Canada a small number of persons and a somewhat larger number of organizations, extremist in outlook and dedicated to the preaching and spreading of hatred and contempt against certain identifiable minority groups in Canada . . . However small the actors may be in number, the individuals and groups promoting hate in Canada constitute 'a clear and present danger' to the functioning of a democratic society.

The admissions of the very small number demonstrate that there is no clear and present danger. The last statement of the committee is an assertion unfounded on the obvious facts. Only four people in Canada are mentioned

as having participated in this distribution: Adrien Arcand (deceased), John Ross Raylor, David Stanley (since defected from the Nazi movement), John Beattie of Toronto. These four people, one dead, one defected, and two without any serious influence or position; does anyone in his right mind really suggest that they are a clear and present danger to 21 million Canadians, when their only weapons are a few trashy leaflets?

(iv) The committee goes on to say at page 27:

The volume of hate propaganda in Canada, as we have noted in the preceding chapter, is relatively small and its intensity is geographically concentrated. Most of the material shown to us appears to come either from outside Canada or from a small number of individuals in Canada out of sympathy with the dominant ideals of Canadian Society.

The committee is conscious of the fact that many people dismiss this material as being unworthy of public attention, much less legislative action. Some, like Dr. Daniel G. Hill, director of the Ontario Human Rights Commission, in his evidence before the House of Commons Standing Committee on External Affairs, believe that the Canadian public, because of its social stability and high standard of living, is relatively immune to extremist anti-Semitic and other 'hate' materials.

In view of the opinions of this nature which are fairly widespread, we have had to ask ourselves whether we are dealing with a significant social problem at all.

The whole record of proceedings before this committee shows they are not dealing with a significant social problem at all when all they can find is four little people, one dead and one defected, leaving a total of two. This is a serious social problem?

The report and the argument of this committee flies right into the teeth of its own evidence. It becomes obvious that this Committee having determined to come to a certain conclusion has gone to that conclusion totally ignoring the facts in front of it.

A few little people in society are sick and irrational. Is that new? The answer is short and simple: Call in a psychiatrist and have them put in an institution. Do not dignify this infantile trash by special legislation that would then inhibit and create a serious dan-

ger to the freedom of all the other Canadian people. This is like using a 10-ton jack hammer to crack a walnut. The Committee has not pointed to one single instance where any of the hate literature has persuaded anyone.

To consider these little self-styled Nazis as a serious power threat to Canada is the utmost nonsense as the Committee well knows. Nazism being hated in Canada, anyone who is interested in power would take some other name even though being at heart a Nazi. Those taking the name Nazi on themselves are obviously frustrated, psychiatric cases, incapable of making any impact on society themselves and seeking to gain some notoriety even by bringing hate on themselves. If their influential enemies would quiet down these people would soon run completely out of steam. We reproduce here for the consideration of the committee some newspaper clippings on this very point.

The net result of all this is very clear: The Canadian Jewish Congress has illadvisedly given these people a platform and fame that they could never have had themselves. This course of error they now want to compound by further damage to the Canadian body of politics through the illadvised legislation they have proposed here.

(v) While the committee had very responsible opinions before us such as that of Dr. Daniel G. Hill, and also the views of the late F. P. Varcoe, Deputy Minister of Justice at the time who said:

I cannot conceive of any act of omission or commission occurring in Canada as falling within the definition of the crime of genicide contained in Article II of the convention that would not be covered by the relevant section of the Criminal Code.

Yet the committee determined to ignore these informed and educated opinions and to seize on the views of Professor Kaufman which may have been more in harmony with the desires of the committee.

Kaufman himself says at page 221:

It is not within the province of this paper to examine such issues as the feasibility or enforcement of laws ... (p. 230) The writer is not competent to judge the possible legal side effects of legislation applicable to the problem at hand.

I agree, after reading the discursive preparations of Professor Kaufman that he is "not

competent to judge". He is not competent to take into account the serious matters that have to be considered in this situation. He has written his argument divorced from the realities of the law. In spite of his admitted incompetence, the committee has chosen to accept his impractical theories while ignoring sensible experience from men such as Dr. Hill and Mr. Varcoe.

(vi) The Criminal Code is not a school book:

Apparently realizing that its proposals were almost completely unenforceable as a matter of criminal law, the committee has retreated to the theory that even if it is not good criminal law, it will be valuable from an educational standpoint.

At page 33 it is stated:

The committee has concluded that minority groups in Canada are entitled to the assurance that society protect them not only against physical attack but also against threat vilification...

People get reassurance in this country when they see the laws fairly enforced against everybody. Canada is a peaceful country, no one is seriously threatened except by the criminal elements and no place in the world has more regular fairness, both in an official and unofficial level. Special assurance a mother tries to give to a frightened child. However, adult people get their assurance from looking at what goes on, not from having special statutes passed on their behalf.

At page 34 the committee says:

Legal technique has been limited generally to the control of the more undesirable external manifestations of bigotry—violence and intimidation, discrimination in education, employment, housing in public places and defamation.

This is correct. The reason is that legal technique lends itself to looking after the above-mentioned items. The law and the law courts are not a forum for intellectual debates. Educational theories about how to eliminate hate, and what type of propaganda may conceivably cause "mental harm to members of the group" are not questions that can be reasonably litigated.

In this era of international discussion at all levels, it would be impossible for Canadian courts for example to determine whether or not certain allegations respecting the history of Italy or Yugoslavia or South Africa are or

are not well founded either in history or in current practice.

The proposals of this legislation reveal that they have been developed in the ivory tower of the universities where charming intellectual discussions are of great interest and probably of great use to the students and professors. Here we are talking about criminal law and criminal code that has to be applied by harrassed magistrates and proved by evidence.

The committee goes on to suggest:

Moreover, technical arguments against Canadian implementation do not take into account the educational value of such legislation.

Since when is the Criminal Code a school book for children. The function of the Criminal Code is to state a low point of human behaviour beyond which people are put in the penitentiary. Trying to write these charming intellectual theories into the criminal law in the hope that they will be educational, and probably without any intention of trying to enforce them, is to create a rock of serious danger that can be most damaging.

Apropos here are the words of Hallam, *Constitutional History of England*, Vol. I, p. 125:

I am never very willing to admit as an apology for unjust or cruel enactments, that they are not designed to be generally executed; a pretext often insidious, always insecure; and tending to mask the approaches of arbitrary government.

THE COHEN COMMITTEE HAS SHOWN MORE CONCERN FOR PROTECTING MOB VIOLENCE THAN FOR PROTECTING FREE SPEECH.

Much is said in the Report about the fact of a riot in Toronto when Beattie tried to speak in Allan Gardens. At p. 32 the Report states:

The Allan Gardens riot may be instructive from a socio-legal standpoint... it would be unwise to disregard the depth of feeling.

What is instructive about a riot?

A group composed largely of Jews decided to take the law into their own hands.

Does the law of Canada allow free speech or free speech provided your opponents do not get a mob to attack you? Mob violence should get no consideration in our law.

Mr. Justice Kellock in the *Boucher* case said at p. 302:

To say that the advocacy of any belief beomes a seditious libel, if the publisher has reason to believe that he will be set upon by those with whom his views are unpopular, bears, in my opinion, its own refutation upon its face and finds no support in principle or authority. Any such view would elevate mob violence to a place of supremacy. Christianity itself, in any form, could hardly exist on the basis of such a view of the law. The *Code* itself protects places of worship from violence and disturbance and the decision in *Beatty v. Gillbanks* (1), establishes that the lawbreakers are those who resort to violence rather than those who exercise the right of free speech in advocating religious views however such views may be unacceptable to the former. The occasions of violence described in the pamphlet here in question were of a nature differing not at all from the situation described in the case just mentioned.

Arguing that this law should be passed because there was a riot is putting legislation approval on mob violence. That is the way the Nazis got in power.

At p. 63 the committee states:

To our minds the social interest in public order is so great that no one who occasions a breach of the peace, whether or not he directly intended it, should escape criminal liability where the breach of the peace is reasonably foreseeable, i.e., likely and we believe that this should be the law regardless of whether the incitement to hatred or contempt against an identifiable group is spoken, written, or communicated in any other way.

In a police state there is no danger from the exercise of free speech. Is that the theory the committee is really recommending?

THE EFFECT OF A LINE OF PROPAGANDA OR ARGUMENT IS NOT A PROPER SUBJECT FOR TRIAL IN COURTS UNDER THE CRIMINAL CODE

Commercial corporations and political parties often pay immense sums to professional advertisers and public relations men in order to develop a line of propaganda that will

appeal to and motivate people. Often such programs are completely ineffective. They do not motivate as expected and the specialists are wrong.

The legislation proposed here assumes that human motivation is so simple to understand that a jury of fishermen in the Gaspé or of trappers in the Peace River can readily decide what mental result will flow to unknown people, at an unknown time, under unknown circumstances from any document placed before the jury.

CONCLUSION

There is no place for this proposed legislation in the Criminal Code.

There is room for an educational program and this is what could be provided.

The proposed legislation is useless and damaging. It should be allowed to proceed no further.

Respectfully submitted,
W. Glen How, Q.C.



First Session—Twenty-eighth Parliament

1968-69

THE SENATE OF CANADA
PROCEEDINGS

OF THE
STANDING SENATE COMMITTEE
ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

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No. 9

Ninth Proceedings on Bill S-21,

intituled:

"An Act to amend the Criminal Code".

TUESDAY, APRIL 29, 1969

WITNESS:

Professor Frank Scott, McGill University, Montreal, Quebec.

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Gouin	*Martin
Aseltine	Grosart	McGrand
Belisle	Haig	Méthot
Choquette	Hayden	Phillips (<i>Rigaud</i>)
Connolly (<i>Ottawa West</i>)	Hollett	Prowse
Cook	Lamontagne	Roebuck
Croll	Lang	Smith
Eudes	Langlois	Thompson
Everett	MacDonald (<i>Cape</i>	Urquhart
Fergusson	<i>Breton</i>)	Walker
*Flynn		White
		Willis

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,
With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Rosbuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code."

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

Extract from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimbursement as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.

Extracts from the Minutes of the Proceedings of the Senate, Tuesday, March 11th, 1969:

With leave of the Senate,
The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.

ROBERT FORTIER,
Clerk of the Senate.

Extracts from the Minutes of the Proceedings of the Senate of Canada, Tuesday, 22nd April, 1969:

With leave of the Senate,
The Honourable Senator McDonald moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators Giguère and McElman be removed from the list of Senators serving on the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

With leave of the Senate,
The Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators McGrand and Smith be added to the list of Senators serving on the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

ALCIDE PAQUETTE,
Clerk Assistant.

MINUTES OF PROCEEDINGS

TUESDAY, April 29th, 1969.

Pursuant to adjournment and notice, the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Aseltine, Belisle, Choquette, Cook, Croll, Eudes, Fergusson, Haig, Hollett, Langiois, Macdonald (*Cape Breton*), McGrand, Méthot, Phillips (*Rigaud*), Prowse, Smith, Urquhart, White and Willis.

Present but not of the Committee: Honorable Senators Leonard and O'Leary.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

The following witness was heard:

Professor Frank Scott, McGill University, Montreal, Quebec.

At 3:15 p.m. the meeting was adjourned to 2 p.m. Wednesday, April 30th, 1969, in Room 260N.

ATTEST:

Clerk of the Committee.
Marcel Boudreault,

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS EVIDENCE

Ottawa, Tuesday, April 29, 1969.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck [*Chairman*] in the Chair.

The Chairman: Honourable senators, it is 2 o'clock, and we have a quorum. We have a very distinguished visitor to address us in the person of Professor Scott who at one time was Dean of the Faculty of Law, McGill University, and who is now engaged in other activities which he will no doubt describe to you.

I have known Professor Scott for a long time. He made a great contribution to our study of civil rights and fundamental freedoms some years ago, after which we brought in a noted report. I am sure that he has not changed his ideas as to fundamental freedoms.

I am sure that you are as anxious as I am to hear what Professor Scott has to say on the subject that is before us, so I will call on him to address us now.

Professor Frank Scott: Thank you, Mr. Chairman, and honourable senators. I come here to oppose this bill totally, and I do it very conscious of the fact that it has a wide support amongst a number of important groups in Canada, and support among the members of the Cohen Committee, most of whom are my personal friends.

I do not need to say that I am as much against hate propaganda as anyone in this room, but nevertheless I cannot subscribe to the principles inscribed in this bill. I cannot consider them anything but dangerous of adoption and inclusion in our criminal law at this time.

I do not wish, Mr. Chairman, to go over ground that has been adequately covered by

many previous witnesses. I have had the advantage of reading all the previous testimony except that presented by Professor Harry Arthurs, which has not yet been printed, though I have some general idea of what he said. I shall therefore try not to be repetitious in respect of what you have already heard, but will confine my remarks to matters I personally feel are of predominant importance in helping you to make up your minds whether or not you should support this piece of legislation. You all know, as Dr. MacGuigan admitted, it is unquestionably an interference with freedom of speech and of the press as we have known it up to now in Canada.

I will group the ideas I will give you around four main principles or concepts. First of all, I think this bill is retrograde, it is a looking backwards type of bill. Secondly, I think it is unnecessary. Thirdly, I think it is dangerous. And fourthly, using a non-legal expression, I think it is old-fashioned.

May I speak to the first of my propositions, that it is retrograde. I think it is running contrary to the spirit of our times in the development of legislation to protect human rights. May I remind you of some of the history of the evolution of our law on human rights over the past perhaps 50 years that I have been involved in considering these questions; at least for almost 40 years. We got along in Canada with the old principles of the common law, with the fundamental concepts of freedom of speech, press, religion and so forth, with no need for any special legislation until right down until 1919, when there occurred the Winnipeg general strike. There was then rushed through the Parliament of Canada a special addition to the Criminal Code, which became section 98, which was a copy from the criminal syndicalist acts of some of the American states. There is no doubt that the Winnipeg general strike shook the establishment—I think that is the current

word—in Canada, but we got through it. You will remember that J.S. Woodsworth was accused of sedition for having cited a passage from the prophet Isaiah. We got through it, but there was section 98 in the Criminal Code. It was crisis legislation passed in a crisis. The crisis passed, and the legislation was then seen to be bad and unnecessary.

I know of no prosecution under section 98 until Mr. Bennett in 1931 proceeded against the eight leaders of the communist Party, Tim Buck and the others, who were charged with violating section 98, and also charged with good old-fashioned seditious conspiracy. There were convicted on both counts, which proves that if we had not had section 98 we could still have put those eight leaders of the Communist Party in jail. We did not need section 98. It had many aspects, which I do not need to go into, including shifting the burden of proof.

At any rate, a great rising tide of indignation against section 98 occurred in Canada, and when Mr. King came to power in 1935 his party, I think very wisely and properly, decided to repeal section 98. They repealed it in 1936, and it has left our books I hope for ever. It was crisis legislation; and it was unnecessary because the old law was adequate.

When it was repealed Mr. Duplessis in Quebec passed the "Padlock Act", as it is called, technically an "Act to Prevent Communistic Propaganda in the Province". Communistic propaganda may not be quite the same as hate propaganda but the concept and principles present the same legal problems. Mr. Duplessis got this law passed in 1938. Of course, it was passed unanimously in the Quebec legislature, because when this kind of law comes up all sorts of people vote for it who do not really like it but they do not want to appear to be against it. If you voted against the law you seemed to be for communism. Well, who can be for hate? Therefore, if you are against this law you might be thought to be in favour of hate. There is a psychology about this type of legislation that, I hope you appreciate, often subconsciously motivates people's attitudes.

The "Padlock Act" was indeed a vicious piece of legislation. It provided for a right in the police on the mere say-so of the Attorney General to go and search in any house for literature that might be communistic. This kind of recommendation was in the original Cohen Report. I am glad to see, sir, that it is

not in your draft bill, although there is on the approval of a judge a right to go and search for literature. A case testing the constitutionality of the Act eventually came to the Supreme Court of Canada and I had the honour of pleading it.

The circumstances were that one night at 11.30 p.m. in late January, in the City of Verdun, police entered a private apartment where there were a man, his wife and little child. The police turned them out on to the streets, with no place to go, and confiscated every book in the house, including a typewriter and blank paper, which might be capable of carrying communist propaganda. In the end we had the "Padlock Act" upset in the Supreme Court of Canada.

There are the two positions. We had crisis legislation in 1919 following the Winnipeg strike, which was a crisis. In the other case, the "Padlock Act", there was no crisis at all; just general legislation against propagating communism, in 1938.

Then we come to that great legal decade of the fifties when the Supreme Court of Canada enlarged the concept of human rights in a series of magnificent cases, of which this country should be proud. I will mention only a few. There was the Boucher case, which defined the law of sedition and eliminated precisely the factor this bill would reintroduce. That is why I say that this bill is retrograde. The law has advanced and this will take it back.

Senator Phillips (Rigaud): Would you develop that a little more, Professor Scott, for a few moments?

Professor Scott: The old law, sedition, counted as an element in sedition the raising of ill-will between different classes of His Majesty's subjects, and dividing one class from another. This could be dividing a race from another. That used to be sufficient, in itself, to constitute sedition. The Supreme Court in the Boucher case said it was not sufficient in itself to constitute the crime of sedition unless it was accompanied with words or provocations or incitements which were likely to lead to a breach of the peace. In other words, under the Boucher decision we were told in Canada that we could publish or utter statements that might have an incidental effect of making people angry and causing a certain amount of ill will, but it was not illegal until it reached that point

where the peace was threatened. Now, if this bill passes we are back to the pre-Boucher law.

I will never forget, Mr. Chairman, how delighted I and all my friends were at the Supreme Court coming out with what we thought was a great clarification in the law, an increase in freedom of speech, yet still providing us in Canada with an adequate protection against real danger.

Senator Phillips (Rigaud): May I put a question to you? In the present act is there not in the proposed section 267B the reference to incitements which is supporting the Boucher case rather than it being retrogressive in relationship to the Boucher case?

Professor Scott: It is true, this refers to it, but it says, "likely to cause". When?

Senator Phillips (Rigaud): I am merely restricting myself. I do not want to interfere with your four important headings.

Professor Scott: I admit, senator, that word is there.

Senator Phillips (Rigaud): Incitement. Your suggestion that incitement is inherent in the Boucher reasoning and therefore this bill is retrogressive because the incitement factor was presumably not present in that case, but in the present legislation the incitement factor is present. Please do not interrupt your line. That is all I wish to make out at this stage.

Professor Scott: I do not need to go over the other important cases that came up; the Birks case, in which freedom of religion in Canada was so adequately described; Lamb versus Benoit, where the police, who had interfered with a religious ceremony of the Jehovah Witnesses, were held personally liable although they had been ordered by their superior to break up the meeting; the Roncarelli case, where an unjustifiable cancellation of a liquor licence of a member of Jehovah's Witnesses because he was giving bail, gave rise to personal damages against the Prime Minister of Quebec. It was a great decade in the evolution of our law. It cleared away vaguenesses that inhibited freedom, without taking away the essential protection necessary to society. That is my judgment on those cases.

We then have the Canadian Bill of Rights coming out in 1960. Since then we have a new development in the law which I would wish to suggest to you, honourable senators, is cru-

cial for you in forming your judgment as to whether their proposed new legislation, which is only criminal law, is in the spirit of our times. We have moved into a new concept of how you protect human rights, and particularly how you eliminate racial discrimination. I refer to the various Human Rights Commissions that are now being established by many provinces, of which I would say without question the best example is the Ontario Human Rights Commission. Here we have a new method of approaching this problem. It still is law, and it takes law to set these up. I want you to ask yourselves this question. Maybe we need new law in Canada. Why criminal law? Why police and trials? We need new law perhaps, but let us explore the new methods with which we approach this problem, because hate, gentlemen, and love—we are in a realm here of human behaviour in which the law is a very clumsy form of control. I work on the B and B Commission. We are in an area of group relations and ethnic relations. Would you not say that the kind of hatred there might have been in certain francophone minorities outside Quebec, in provinces that did not recognize them properly, is reduced, not by criminal law, but by the law that recognizes their minority rights? This is how you release the hatred, by this new kind of human rights legislation, wherever it is needed. Do not just rest content with more prohibitions.

Our anti-discrimination laws are greatly advanced. They are developing all the time, it seems to me, in province after province. There is going to be a new British Columbia law on Human Rights. This new kind of approach is almost like a social worker's approach. We do not try to put in prison immediately the barber who does not want to cut the hair of a black man. We do not haul him into court as the first step. We have an experienced person who comes from the Human Rights Commission, having had a complaint, and says to him "Look, what is going on? What are you doing; talk to us about it." You ease into a human relationship. Ninety-nine times out of 100 nobody has to go to prison and they will stop the discrimination.

We are now appointing ombudsmen. The ombudsman is primarily concerned with the relationship between the Government individuals and may not have a direct relationship to this problem of hate literature, though he might have. It is the concept of the Human Rights Commission that is most rele-

vant, with adequate staff. There is no use making declarations of rights if you do not follow it with adequate machinery to put it into effect. You know the old tradition of the English law: *Ubi remedium Ibi Jus*—Where there is a remedy there is a right. If you have a right and no remedy you have no right. I could produce for you here the extracts from the Russian Constitution proclaiming the freedom of the individual, freedom of speech, et cetera. It also proclaims freedom for demonstrations. Can you imagine what freedom one demonstration would have in the Soviet Union if it were not organized by the government? It is possible to have rights in Canada with no Bill of Rights, not even the federal one. We have the rights, because we have the remedies. My first point, and I say this with all seriousness, is that I see this present bill, which is exclusively the old criminal law, with sentences of months or years in prison, to be old fashioned. It is not the way we should approach this kind of problem today, which is a deep, human, psychological problem. The bill is contrary to the spirit of the times. It is retrograde.

My second main point is, I do not think the law is necessary. It is crisis legislation, and there is no crisis. Why do we need it now? Is not our country reasonably tranquil? Have we not a great deal of law capable of coming into use if there is really a series of great disturbances caused by hate literature? I do not want to go over all this.

Senator Phillips (Rigaud): Professor Scott, may I interrupt you again, sir. I am a McGill man, therefore if I show some deficiency in my legal knowledge, you, as one of the deans and your predecessors must take responsibility for that. Would you prefer that we ask you questions under these individual headings as you go along, or would you prefer that we should wait until the completion of your presentation?

Professor Scott: I would be happy to reply as you wish—in case one may miss the point at a later date.

Senator Phillips (Rigaud): I would prefer to ask as you go along, but I think my fellow senators would prefer if I held back until you have completed.

Senator Willis: I would prefer the witness to give his full testimony and then he can be cross-examined, by any person who wishes. Senator Phillips has interrupted him four

times already and I am here to listen to his presentation and not to hear the cross-examination at this time.

Senator Phillips: Mr. Chairman, I am not aware that my colleague can direct me to any rules in regard to hearings before this committee by reason for which a question directed to the witness is capable of being regarded as an interruption of the proceedings. May I be guided on that, Mr. Chairman?

The Chairman: That is correct.

Senator Croll: If I may—Senator Phillips' questions were for clarification, some matters and I myself thought they were quite proper.

The Chairman: These meetings are very informal. They are committee meetings, not meetings in the chamber or in the Commons. However, this discussion is purely academic. Senator Phillips has said that he will wait until the conclusion of the address before he has some questions to ask and some discussion to initiate. I think we can proceed harmoniously.

Professor Scott: My second point, as I was saying, Mr. Chairman, is that I do not think this bill is necessary. By that I mean it undoubtedly is an increase in the prohibitions of the Criminal Code and therefore a decrease in the freedom of the individual. I see no pressing evil in Canada at this moment that makes it necessary. I do not think we should extend the prohibitions to the Criminal Code unless there is clear evidence that in some area it has been quite inadequate. This country is not in any danger of being thrown into great confusion, civil war, mass suppression of minority rights.

Even in the report, the members had before them Doctor Daniel Hill, who is Director of the Ontario Commission on Human Rights, and he said he believed that Canadian public, because of its social stability and the high standard of living, is relatively immune to extremist anti-Semitic and other "hate" materials.

I would not have thought it was necessary to labour this point. The report attempted to show there was some real danger in the country, but they kept having to hedge on that. They said, on page 24:

However small the actors... those are the hate propagandists... may be in number, the individuals and groups promoting hate in Canada consti-

tute 'a clear and present danger' to the functioning of a democratic society.

With all respect to the committee, I think that is a gross exaggeration. The report was made in 1965. We are now in 1969 and we have been functioning fairly well as a democratic society.

Being hard pressed to find any evidence that would be serious enough, they go through the report without saying much on this crucial point. I would point out that so serious a step as curtailing further the present fundamental freedoms of Canadians deserves much more evidence of real danger than anything that came before that committee or has been put before you.

My second reason for saying that this bill is unnecessary is that there seems to have been an idea that we ought to pass it because of international obligations. I submit that that also, Mr. Chairman, is not true. Incidentally, honourable senators, amongst the various documents you may wish to read, I do not know whether you have before you an article on this particular report, written by perhaps the best legal expert on civil liberties in Canada at the moment, Dr. Walter Tarnopolsky, Dean of the Law School at Western University, who has published an excellent book on the Canadian Bill of Rights where all the law up to that point is eminently explained. He, I might say, is opposed to this bill.

On this issue of fulfilling any obligations we may have internationally, there are two international conventions that might seem to give us obligations. There is the Genocide Convention, and the Convention on the Elimination of All Forms of Racial Discrimination.

There is good authority to say that our present law is adequate to fulfil our obligations under both those conventions. Dean Tarnopolsky quotes the late Mr. F. P. Varcoe that "no legislation was required by Canada to implement her obligations under the Genocide Convention." He quotes Mr. Lesage, who was then a member of the Federal Cabinet, saying in the Standing Committee of the House of Commons, on behalf of the Government of Mr. St. Laurent, that "the opinion of the Deputy Minister of Justice, which is accepted by the Canadian Government, is that the provisions of the Criminal Code as they are now cover all possibilities, and are such that any of the acts mentioned in Articles II and III [of the Genocide Convention] are punishable under our law."

There is, therefore, no obligation even morally are, in my submission, to make any change in our law because we have ratified the Genocide Convention.

When we come to the later Convention, namely that to eliminate all forms of racial discrimination, there again Mr. Tarnopolsky's argument, which I accept, is that Article 4 of that Convention requires "states parties to the convention to take appropriate measures" to:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...

That seems to suggest that the mere dissipation of ideas should be punished, but the very convention has another article, Article 5, which declares that the obligation to carry out this enactment of new legislation must be undertaken—and here I quote:

with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention.

As Dean Tarnopolsky states "the representatives of the United States Government have pointed out that because of this "due regard" clause, the phraseology of Article 4 and that is the one which refers to the need to carry out the Convention in the domestic law—did not impose on the United States the obligation to take any action impairing the rights to freedom of speech.

Mr. MacGuigan also in his testimony before this honourable committee admits that the bill before you, and the recommendations of the Cohen Committee, go beyond the international Convention. He says on page 98:

Now I believe that the bill,—
That is, the bill before you.

—and the recommendations of the Cohen Committee, go beyond the international Convention, and I believe they go beyond anything now in Canadian law.

Mr. Justice Batshaw, when he was before you, quoted a very interesting resolution adopted by the European Consultative Assembly of the Council of Europe. Honourable senators, if there are any nations in the world who know what hate propaganda is, it is the nations of Europe, and they have a Council and a Consultative Assembly. It has no power to enact binding law on its members, but it

does express a growing sense of the unity of Europe. I need not read all the six parts of that resolution quoted by Mr. Justice Batshaw. They point out the dangers of hate propaganda, the horrors that can follow from it the abuses and so on, and, at the end, this is how they conclude at page 68 of your proceedings.

The Consultative Assembly. . .

'6. Addresses a solemn appeal to all Europeans, and especially to the legislative, governmental, judicial and educational authorities of member States, to take appropriate measures, if necessary of a legislative nature, . . .

I wish to underline that:

...if necessary of a legislative nature, to eliminate such abuses and to ensure particularly that their youth are brought up in respect for the rule of law and the dignity of every human being, regardless of race, religion, nationality or ethnic origin; . . .'

Mr. Chairman, even these nations who have come through the fire are not committing themselves to anything except proper measures to combat this evil. If necessary, then legislation. They do not go first to legislation, as we do, least of all of a criminal kind.

So I conclude this part of my submission by saying that the legislation is unnecessary. Our present Criminal Code will handle all the conceivable dangers that we may foresee at the moment.

My third point, Mr. Chairman, is that the legislation as drafted is very dangerous because of certain ambiguities and, to use a phrase that has been coined in the American Supreme Court, because of its "overbroad sweep", it covers too much ground.

I do not wish to go into the technicalities of this bill at any great length here. You have had expert advice on this. In any event, Mr. Chairman, I am working on the principle that, if a thing is not worth doing, it is not worth doing well. If you should not have the bill at all, why try to improve it? I am not terribly interested in trying to improve it. If you asked me whether I would rather have a less broad sweep or a bigger broad sweep, of course I would say that I would like to have a less broad sweep. I am not trying to improve it, however. I am just pointing that out. Let me list some of the dangerous points in the bill, for example, we have the question of what "mental harm" hate propaganda is

doing. We are going to have a fine time in the courts trying to define "mental harm".

Then, what "incitement" is likely to lead to a breach of the peace? And when? Above all, why should this prohibition have effect inside a private house? Can I not be a beast of a man in my own home, saying I think so and so should be eliminated? I know I should not do it, but I do not want the state in the sitting rooms of the nation any more than I want it in the bedrooms of the nations.

The Chairman: You cannot commit murder in your private house.

Professor Scott: No, nor in the bedroom. That is right. I think my right to intellectual freedom is even greater than my right to sexual freedom, frankly.

Senator Prowse: At this stage it is more important, possibly.

Professor Scott: I do not see the need of the law entering the home, and I am quite astonished that such a group of academics—and they are mostly academics, are they not?—would come out with such a proposal. I mean, this is the sin against the academic Holy Ghost. I think, if you are not in a situation where you are going to endanger the peace, the human mind must be free to pursue any level of investigation it likes, in any way it likes, without restraint.

Dr. MacGuigan himself said that philosophic discussion of genocide was barred, and the Report very curtly rejects any notion of free opinion here!

In our opinion there should be Canadian legislation to prevent any advocacy of genocide. So abhorrent is such advocacy that it can have no standing whatever as argument in a democratic society.

I can understand that it may not have standing as an argument in a public place or on a public platform. Even that might depend on the manner in which you were doing it. But how this can justify entering into the private home, I do not know. I see no point for it. How are you going to prove what goes on in the home? It will be the most ineffective law. It will not really get into the private home. It will just be creating a kind of vague fear. It is not necessary, even for the purpose of the bill, in my submission.

So there are these dangerous phrases in the bill.

Secondly, this bill gives us a false sense of security. We are not attacking the causes; we

are making a gesture on the criminal law side and then everything else goes on as before.

Now, Mr. Chairman, how you eliminate hate in the world, I do not know. Maybe we should not ever expect it. It may be the other side of the coin of love. It is a potential emotion. It is an emotional force. Righteous indignation can perhaps be a good thing.

The Chairman: Righteous indignation is not hate.

Professor Scott: Hating evil? It is a very difficult line to draw. As I said, the forceps of the law are clumsy instruments for entering into this psychological field.

I think that because this is the only thing we are going to do about hate literature it gives us the false sense that we have done something important. I do not think that we have. I doubt if we will have more than one case every five years under this bill. I hope not.

My third argument to show that this bill is dangerous is that it is bad education for the public. I know that the Cohen Report argues that this type of law is good education, because it teaches people that they ought not to preach hate. Yes, but it also teaches them that the way you stop hate is by having the police lay charges and putting a man in prison. That is worse education than the good education that might flow from it.

That is not the way you make people better. What happens, if you put a man in prison for three months and he comes out again? We are getting away today from the whole concept of this old style criminal prosecution as a method of handling difficult human relations. We have a more modern approach, a more psychological approach. I cannot help saying that while I have taught law for 40 years, it has always astonished me that there should be such a close relationship between astronomy and punishment. Why should the number of times that the moon revolves around the earth determine the length of a man's day in prison—one month, two months, four months—or why should it be determined by the number of times the earth revolves around the sun—one year, two years, five years? To me it seems to be the most primitive hangover barbaric days. It is extremely old fashioned. This brings me to my last point, Mr. Chairman.

Why is this question raised in connection with criminal law? No international convention says that if you have to make laws in

this matter they have to be criminal laws. The Report says at page 33:

The need for a serious general study of efforts through education to deal with the problems of hate propaganda was considered beyond the scope of the enquiry.

That was no doubt their choice, but if it should happen that education is the crux of the matter then the report is not based on adequate evidence. I think the committee has a right and indeed a duty to look into that question. They were invited to report to the minister "surveying the nature and scope of the hate propaganda problem in Canada in all its various aspects, and to consider and prepare recommendations for its suppression and control, if such measures were deemed to be necessary." These terms of reference are very broad. The committee did go somewhat beyond a mere analysis of the existing criminal law. They brought in a distinguished psychologist, Dr. Kaufman, and sixty pages of the report is taken up with his testimony. This comes to the conclusion—which does not seem to have had much effect on the committee—that, and this is at the end of sixty pages of his report, . . .

The writer is not competent to judge the possible legal side effects of legislation applicable to the problem at hand, . . .

And I would have thought then that they had no evidence before them of a psychological nature to justify this particular type of proposed remedy.

I suggest with all respect to this committee, which did a serious piece of work, that this report is unbalanced. It is all on this ancient legal side of criminal law. It pays some attention to other approaches but does not suggest anything that should be done about it, and does not suggest what I suggest to honourable senators that this type of law is premature until we have explored other methods of dealing with this problem. I submit that you have no right to leap into an amendment of the Criminal Code when there is such an area of alternative procedures to be explored. I would remind you again that the proposed bill is a reduction in the amount of freedom of speech and press that we have had in Canada up to this moment.

Certain other steps that could be taken were in fact mentioned, that is to say non-legislative preventive measures. This is on page 31 of the report. It is not necessary to bother you by reading these to you. They are

all there. As I say, these are non-legislative measures—educative, social pressures against the propagandist, disapproval and discrediting of the source, group disapproval, discrediting the information and so forth. No recommendations were based on them.

In addition to that I come back to what I said at the opening of my presentation about new measures taken to eliminate discrimination in housing, employment, access to public places and the like. All these things are really educating Canadians in the equality of human beings and in rendering unnecessary the criminal law in these matters. This is the constructive line on which I have shown our legislation has been developing. I suggest we need more new approaches to this problem, and they have not been offered by this committee. And I suggest with all respect that this committee might well have asked for them. Dr. Tarnopolsky has asked why we should not have a Canadian Human Rights Commission to look into federal responsibilities in this area. How about more help for research into hate propaganda and group relations, because we are increasingly aware that they dominate much of the public life in many countries. May I give you a statistic, Mr. Chairman? It has been established before the Bilingual and Bicultural Commission that there are 2,250 identifiable languages in the world and only 130 countries in which to put them; so somebody is going to have a language problem. We must learn new ways of protecting group rights. What about injunctions against persons spreading this hate literature? What about requiring them to post bonds for good behaviour in the future? There are all sorts of measures outside the criminal law which would be adequate and would not give that publicity which sometimes makes a hero out of the hate propagandist.

That constitutes the basis of my presentation, Mr. Chairman.

The Chairman: Thank you, Professor Scott. Now I gather there were some questions. I think Senator Phillips (Rigaud) would like to have the floor.

Senator Phillips (Rigaud): I have some questions to ask but I think my colleagues Senator Willis might think I was taking too much time, so I will defer until later.

Senator Croll: I have a question to ask. Professor Scott, you spoke of other methods and among them you mentioned the posting of bonds. Then you spoke of the best human

rights commission in Ontario and you quoted Hill. Which of these other methods have not already been tried, for instance in Ontario?

Professor Scott: Injunctions. Requiring the individual who is continuing to spread this propaganda to post a bond.

Senator Croll: It has been tried.

Senator Prowse: On what basis could you get an injunction? What law would cover it?

Professor Scott: If necessary, make a new law. It would not of necessity have to part of the criminal law. This is something that could affect the whole community.

Senator Prowse: You referred to the posting of bonds. Can you tell me where it is possible to have a person post a bond unless there is a suspended sentence which brings the whole thing into operation?

Professor Scott: I am just suggesting that this could be done without a recourse to the criminal law.

Senator Prowse: But how could you promote civil rights without resorting to laws that are quasi criminal laws in their effect? Furthermore, what is the difference between the quasi criminal law to be found in the provincial area and the type we are providing for here?

Professor Scott: I think it is a totally different situation. It does not look like the same attack on fundamental freedoms at all.

Senator Prowse: Well, if I have a rooming house and if the law tells me that I have to let anybody into my rooming house without discrimination, where is that any different or where is it any less an infringement of my freedom than a law such as we have here which says that I may not say unreasonably nasty things about my neighbour? What is the difference?

Professor Scott: I just think it is in a different level of the legislative process. I do not think it represents the same, as it were, national decision in respect of the criminal law. The procedures by which you enforce it are different; they are much more rapid; they have not the same degree of publicity; and I suggest that though maybe philosophically there is no great difference, I think practically there is considerable difference.

Senator Prowse: But if something is deemed to be desirable, it now requires 10

acts from 10 legislatures to put it into effect, if you are dealing with it from a civil rights point of view.

Professor Scott: But I do not think you need it in every province. Where do you get hate propaganda going on in New Brunswick?

Senator Prowse: You praised the fact they do have civil rights legislation in Ontario.

Professor Scott: But that does not deal with hate propaganda, as I understand it; it deals with discrimination.

Senator Prowse: Which is a basic material of hate.

Professor Scott: I am suggesting this type of legislation removes hatred and teaches people to respect equal treatment more than will this thing under the Criminal Code.

Senator Prowse: Let us turn to something else. I think you would agree, if I understood you correctly, that the really useful job is to be done in the field of education.

Professor Scott: Plus anti-discriminatory laws. I am not talking about education only in schools.

Senator Prowse: But anti-discriminatory laws are part of civil rights and, therefore, we require 10 laws in 10 provinces.

Professor Scott: You do not have 10 provinces where there is a great deal of danger. I do not want any law where there is not any danger.

Senator Croll: Professor Scott, following this question: Within the one province that you point to—where they have tried very hard to deal with colour discrimination in housing and hotels, discrimination of every conceivable kind, intelligently—the greatest abuses in this hate field are being conducted at the present time, and that is where most of the trouble is. How do you explain that?

Professor Scott: I think there is quite an easy explanation. It is precisely into that province that have come the greatest number of immigrants from Europe who most recently have arrived from countries where this issue was really a crisis, and they have come in and they are sensitive, are very troubled and are not accustomed to the way we do things in Canada. The slightest suggestion of some kind of hate makes it impossible for them to contain themselves. In five or ten years that will all have vanished.

Senator Choquette: They will attend a meeting in great numbers to start a row. That is what we have seen so far.

Senator Croll: You say it is because these immigrants have come in, and you have a point, because they are certainly sensitive in that regard. We have had a lot of immigrants come into this country since the war, as you very well know, particularly into the province of Ontario, and they are very, very sensitive to that. Have not we a duty and responsibility to this vast number of citizens who are highly sensitive to this sort of thing?

Professor Scott: They have only been subject, as I remember the news, to one or two such incidents in 20 years. That is not much.

Senator Phillips (Rigaud): Professor Scott, you have as the first point of your objection referred to hate attitudes and hate literature generally being retrograde.

Professor Scott: This bill is retrograde.

Senator Phillips (Rigaud): I would like to draw your attention to the fact that under subsection (8) "hate propaganda" is defined as something leading specifically to something that might involve genocide; and under section 267B, hate literature relates itself specifically to the possibility of a breach of the peace or public discussions that may lead to hatred and contempt against identifiable groups.

Now, are we not slipping into the danger of criticizing this bill as attempting to deal generally rather with expressions of opinion, and on that basis I would agree with you; but is it not a fact that this bill, though generally defined as a hate bill, is a bill that specifically deals with acts of parties leading to the commission of physical offences?

Professor Scott: Mental harm?

Senator Phillips: Before we get to mental harm, my dear professor—and I would like to record in the record at this point that I yield to nobody in this room in respect for your ability, competence and status as a great constitutional lawyer. As a McGill man, I think I know that better than most people, and I would not want any misunderstanding on that score. However, I still reserve my right to cross swords with you, metaphorically, on some of the matters you have presented. It is obviously forensically correct to mention mental harm and to make a thrust at that

chink in the armour, but I was not dealing with mental harm. Before we come to that, mental harm, first let us deal with that real blunderbuss of section 267A, where we deal with the subject matter of advocating and promoting genocide in terms of the liquidation of an identifiable group of people and, specifically, leading to the possible killing of members of this group.

I asked a gentlemen who I think was associated with you in the Supreme Court in the Jehovah Witnesses case, last week—and you have also taken the position that the legislation is unnecessary—to give me the section of the Code under which you would proceed in order to get after somebody who was out to commit genocide or to incite genocide, and he gave me the public nuisance section, section 160, of our Criminal Code. I ask you this question, Professor Scott: Do you agree with Mr. How, who is an eminent lawyer, that section 160 of our Criminal Code could well cover the situation contemplated by section 267A? Would you like to look at the Criminal Code? I know you are brilliant, but I do not expect you to have the particular section in mind.

Professor Scott: Mr. Chairman, I am not a criminal lawyer. My first defence first reminder in respect of this question is: I really am not trying to improve this particular piece of legislation; I think it should not be passed.

Senator Phillips (Rigaud): Sir, your second point was that the legislation was unnecessary because there are sufficient provisions of law, as I understood you to say, to cover that type of offence which is covered by this legislation.

Professor Scott: Perhaps I did not make myself clear, senator. I said that this legislation goes beyond anything in the present criminal law and that is very clear.

Senator Phillips (Rigaud): I see.

Professor Scott: My opinion is that the present law covers enough of what you need to cover to maintain peace in society.

Senator Phillips (Rigaud): That is a different point. You said that under Point 3 of your reasoning. With the utmost sincerity and profoundest respect, on the assumption that we do desire to have in this country legislation to get after people who preach hatred to the degree of incitement to kill the members of an identifiable group, is it your opinion that we

have legislation in the Criminal Code to cover that type of offence?

Professor Scott: We have legislation to cover it adequately, in my opinion. That is to say, we have legislation—and the Boucher case made that clear—to make it a crime to use words in public to an audience which would make them want to break the law or to use violent means to do something. If it is only words which at some future indefinable time might induce that, then I say we have no such legislation, and should not have it.

Senator Phillips (Rigaud): You are dealing with a question of policy as to whether it is desirable to introduce legislation against genocide rather than with the issue of whether we have presently existing law that would deal with the commission of the crime of genocide.

Professor Scott: I quoted Mr. Varcoe, and the opinion of the federal Government, at the time of the genocide convention to show that the Canadian law at that time adequately fulfilled our obligations under the convention. Therefore, we have law that covers adequately all that we ought to do in order to prevent genocide.

Senator Phillips (Rigaud): I would like guidance, my dear professor, with respect to the provision in the law that enables me, if I so desire, to lay a charge against a man who incites a group of people by saying: "I want you to come with me to kill an identifiable group"—or to do any of the things listed in section 267A(2). I am looking for the law by which I can reach that man.

Professor Scott: Surely that would be the counselling of the commission of a crime.

Senator Phillips (Rigaud): What is that?

Professor Scott: The counselling of the commission of a crime.

Senator Phillips (Rigaud): The counselling of the commission of a crime?

Professor Scott: Yes.

Senator Phillips (Rigaud): And you think that that would be sufficient?

Professor Scott: Yes, I would think so.

Senator Phillips: If there is no crime in the Criminal Code in respect to the killing of an identifiable group without specifically refer-

ring to an individual, would you say that that crime is covered?

Professor Scott: You cannot kill a group as such. You have to kill the individuals in the group, and the killing of each one would be a separate murder.

Senator Phillips (Rigaud): Then, if you feel it is covered by certain sections of the Criminal Code, what objection have you to section 267A which, in the opinion of some people, makes it clearer and more identifiable? If you say it is covered then what objection is there to the passage of legislation which would make it clearer beyond any peradventure of doubt?

Professor Scott: Because it goes much further. It does not make the same thing clear. It goes much further.

Senator Phillips (Rigaud): Then, we are back to the point that you are objecting to the policy of the type of legislation. You are objecting to the policy that it should be a crime to incite others to kill a group of identifiable people? We must be very careful in respect of what we are dealing.

Professor Scott: I am objecting to an extension of the law to prohibit acts now permissible, and for the prohibition of which there is no justification.

Senator Phillips (Rigaud): I see. So, you are against this bill as a matter of policy, but you are not against it on the basis that there are adequate provisions in the law to deal with the subject matter, because under the second of your four headings you say it is unnecessary. To my mind, if a thing is unnecessary then there is legislation to cover it. It is either one or the other.

Professor Scott: I am sorry, senator, but I cannot quite understand the difference between us. I do not want any further reduction of my fundamental freedoms. There is no question but that this reduces them further. I say it is not necessary to reduce them further because the country is not in a state of disorder.

Senator Phillips (Rigaud): I think we have got that clear. You say that as a matter of policy you are against legislation which covers the possible crime of genocide that is included in the proposed section 267A because you think it is not necessary in this country...

Professor Scott: It is adequately covered.

Senator Phillips (Rigaud): ...rather than because we have already laws to cover it?

Professor Scott: No, I say that we have adequate laws to cover the substance, and we need no further law.

Senator Phillips (Rigaud): But the subject is the crime under section 267A. If the present law adequately covers the crime in section 267A then what is your objection to its reiteration and clarification?

Professor Scott: It is not only reiteration; it is an extension beyond the limits of the present law.

Senator Phillips (Rigaud): Then we have not the law to cover it.

Professor Scott: No, we have not the law to cover the extra piece, but that is unnecessary.

Senator Phillips (Rigaud): We have not a law against genocide?

Senator Aseltine: And we do not want it either.

Senator Phillips: I am just trying to get the opinion of the witness as to whether we have such a law or not.

The Chairman: Order, please. What is the offence that is not in the present code?

Professor Scott: Mr. MacGuigan said:

Now I believe that the bill, and the recommendations of the Cohen Committee, go beyond the international convention, and I believe they go beyond anything now in Canadian law.

I say that the extra amount by which they go beyond the present Canadian law is not necessary. The killing of a member of a group is a murder, and it is covered. Causing serious bodily harm to a member of a group would certainly be a crime under the present law.

Senator Prowse: But you are looking at the definition and not at the offence.

Senator Phillips (Rigaud): The words are "advocates or promotes". It is the advocacy or the promotion of genocide that is to be a crime.

Professor Scott: Well, that would come within the counselling of the commission of a crime.

Senator Prowse: If a person is charged with counselling the commission of a crime then if I am acting in his defence the first thing I want to know are the particulars of the crime, the commission of which he is charged with counselling. At the present time if it was the crime of killing, maiming, or something else it would have to be against a specific person or there would be no offence. Would you agree that that is a fair statement of the law?

Professor Scott: I think so. My reply is that we do not need the extra protection. There is nothing in the conditions of life in Canada today that warrants this extension of the criminal law. Hateful though this type of thing is, there is such a minimal amount of it that we ought not to tamper with the Criminal Code.

Senator Prowse: If this summer we had large numbers of people advocating at the same time across Canada the killing or maiming of the members of any particular identifiable group, would you then feel that this law is justified and that we ought to pass it?

Professor Scott: I admit that there could come a crisis situation. I think the English are in such a situation with the number of coloured immigrants that they have.

Senator Prowse: And that with their immigration laws and everything else. Do you not feel that we would be unwise not to pass this legislation now, and that to pass it later on would be like closing the barn door after the horse has gone?

Professor Scott: I do not think that is the approach to take. I would step up education in the immigration department in respect of the selection of people. I would not put this as the first step towards stopping hate.

Senator Prowse: How do we select people for immigration when the world is shrinking as fast as it is without leaving ourselves open to every kind of misunderstanding and ill feeling?

Professor Scott: We select them already.

Senator Croll: Professor Scott, why do you say this is the first step? Have not the provinces very commendably attempted in their own way to take some steps in this direction—that is, in the educational field of which you speak?

Professor Scott: There is no Canadian human rights commission.

Senator Croll: There does not have to be a Canadian human rights commission. There are such bodies as provincial human rights commissions, and they do a good job within their limited scope. Now we are attempting, of course, to set up something beyond that. What is wrong with what has been done up to date? You admit that a great deal has been done educationally. Why has it not been effective?

Professor Scott: I think it has been effective, senator. Where is the great trouble in Canada? We are very tranquil.

Senator Choquette: It is because of Beattie, a crackpot who acts by himself in Toronto. That is what we are arguing about.

Senator Croll: You have not heard me quote Beattie.

Senator Choquette: That is all we do hear.

Senator Croll: Let us forget Beattie. Professor Scott, you talked about this bill in the sense of causing mental harm. Or did I misunderstand you?

Professor Scott: It is in the bill.

Senator Croll: Did I understand you to say the effect would be upon the public, or upon the people? I missed your evidence on that.

Professor Scott: In the definition "genocide" includes:

- acts committed with intent to destroy in whole or in part any group of persons. . .
- (b) causing serious bodily or mental harm to members of the group.

Senator Croll: You made some comment on that.

Professor Scott: I was simply including this as one of the vague phrases in the bill that in their totality make the bill to me somewhat dangerous. I would point out to the senators present that this is not an exhaustive definition of genocide; it "includes" this. A reactionary judge might invent all sorts of further notions of genocide and we will never know where we are.

Senator Prowse: Maybe we would have a reactionary appeal court at the same time.

Senator Willis: Where in Senator Croll's opinion have the discretionary laws in the

Province of Ontario fallen down? In my opinion they have worked 110 per cent. These cases have been prosecuted through the courts and won all the time. The Dresden case in the Province of Ontario has fulfilled its promise with regard to discriminatory laws. It does not need this bill to help.

Senator Croll: For the record I think I said they were the best laws in all of Canada.

Senator Willis: I agree.

Senator Croll: I am amazed that my friend was not listening to me.

Senator Willis: I was listening but I did not hear you say "in all of Canada".

The Chairman: Can we confine ourselves to questions from now on? Has anybody else something in the way of a question?

Senator Hollett: I do not know whether other senators have received a letter similar to one that was in my file this morning on my return. It is from, I think, a lady who wants to know what hatred is and how it is defined. Could Professor Scott please define hatred for me?

Professor Scott: I am sorry, but I am in the same position she is in.

Senator Hollett: So am I.

The Chairman: It is not hard to recognize it when you see it.

Honourable senators, there is one thing to which I should like to call your attention. We have present in the room Mrs. Ruth Machida from Uganda. She is under the tutelage of our counsel and is here studying the legislative process of this country. I would like her to rise, if she will, and take a bow.

Hon. Senators: Hear, hear.

The Chairman: It must be obvious to her that she is very welcome. I hope she will learn something from the processes of law in this country, which we are here to improve if we can, and will take home a good report of us and our thoughts to her fellow citizens of Uganda.

This seems to conclude Professor Scott's presentation. On behalf of all of us here, those who agree and those who disagree, I want to thank Professor Scott for coming here and giving us his thoughts on this matter very forcefully and clearly, and as far as he knows certainly in the public interest.

Hon. Senators: Hear, hear.

The Chairman: Professor Scott, that is the response to my words of thanks for your coming.

Professor Scott: Thank you, Mr. Chairman, for the opportunity.

The committee adjourned.





First Session—Twenty-eighth Parliament
1968-69

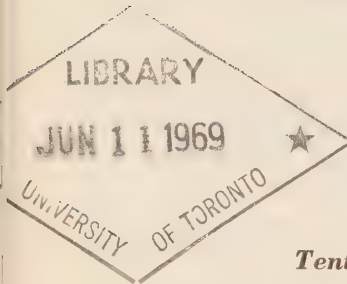
THE SENATE OF CANADA

PROCEEDINGS

OF THE
STANDING SENATE COMMITTEE
ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*



No. 10

Tenth Proceedings on Bill S-21,
intituled:

"An Act to amend the Criminal Code".

WEDNESDAY, APRIL 30th, 1969

WITNESS:

Dr. W. P. Oliver, Chairman, United Black Front.

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Gouin	McGrand
Aseltine	Grosart	Méthot
Bélisle	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly (<i>Ottawa</i> <i>West</i>)	Hollett	Roebuck
Cook	Lamontagne	Smith
Croll	Lang	Thompson
Eudes	Langlois	Urquhart
Everett	Macdonald (<i>Cape</i> <i>Breton</i>)	Walker
Fergusson	*Martin	White
*Flynn		Willis

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—

Resolved in the affirmative."

Extracts from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimburse-

ment as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extracts from the Minutes of the Proceedings of the Senate, Tuesday, March 11th, 1969:

“With leave of the Senate,
The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

Extract from the Minutes of the Proceedings of the Senate of Canada, Tuesday, 22nd April, 1969:

With leave of the Senate,
The Honourable Senator McDonald moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators Giguère and McElman be removed from the list of Senators serving on the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

With leave of the Senate,
The Honourable Senator McDonald moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators McGrand and Smith be added to the list of Senators serving on the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

Alcide Paquette,
Clerk Assistant.

MINUTES OF PROCEEDINGS

WEDNESDAY, April 30th, 1969.

Pursuant to adjournment and notice, the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Aseltine, Choquette, Cook, Fergusson, Gouin, Haig, Hollett, Lang, Langlois, Macdonald (*Cape Breton*), McGrand, Phillips (*Rigaud*), Prowse, Smith, Urquhart, Walker and Willis.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

The following witness was heard:

Dr. W. P. Oliver, Chairman, Black United Front.

At 3:15 p.m. the meeting was adjourned to 2 p.m. Thursday, May 1st, 1969, in Room 256S.

ATTEST:

Marcel Boudreault,
Clerk of the Committee.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Wednesday, April 30, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2.00 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The Chairman: Honourable senators, it is past two o'clock by two minutes and we have a quorum. We have a very distinguished guest who will address you, Dr. W. P. Oliver. He is of the Adult Educational Division of the Department of Education of the Province of Nova Scotia. He comes here speaking on behalf of—and he can tell us whether it is representative or not—18,000 black people of Nova Scotia. His chief capacity here this afternoon is as Chairman of the Interim Committee of the Black United Front.

Dr. Oliver has had a distinguished career. He served in World War II as a black chaplain. He was born in Wolfville, Nova Scotia, in 1912. He graduated from Acadia University with a B.A., B.D., and from King's University with a D.C.L.

He has been pastor of the Cornwallis Street Baptist Church for 25 years, from 1937 to 1962, and he has been the regional representative for Halifax, Dartmouth and Halifax County for the department dealing with school boards and organizing classes, both setting up the classes and organizing the people who attend.

Dr. Oliver is a teacher in the summer schools in human relations, and is an advisor to the Department of Education on education- al programs for negro communities.

I feel I have only touched the outline of the life of our distinguished guest, but that is enough to identify him at least and to indicate to you senators who will listen to him

with great respect this afternoon that he speaks with some authority in the matters in question before this committee.

Without more ado may I introduce Dr. W. P. Oliver.

Dr. W. P. Oliver, Adult Educational Division Department of Education, Province of Nova Scotia: Thank you, Senator Roebuck. Honourable senators, I appreciate the opportunity to be with you this afternoon. Due to the uncertainty of weather in the Halifax area I was unable to make your meeting yesterday, but I am thankful for this privilege.

I have read with interest the records of your previous considerations of the social implications of Hate Propaganda in Canada.

I have been requested to address myself to the relevance of this matter to the eighteen thousand blacks in Nova Scotia. Negroes have not been the subject of hate literature to any great extent in the province. There have been occasions during periods of special emphasis on human rights or equality of opportunity that Negro leaders have received personal and anonymous letters cautioning them not to be misled by the so-called "Communist Devils". I, personally have received such letters advising me, for instance, that the death of Dr. Martin Luther King Jr. was a consequence of his involvement in the "Communist Plot".

However, the fact that hate literature directed against Negroes is practically non-existent does not conclude that other methods of communications are not used to propagandize.

There are indications that in spite of the results of scientific research, Negroes in Nova Scotia are considered by many to be innately inferior. This myth unsubstantiated and obsolete has persisted in this province for over two hundred years.

There are religious sects that interpret the scriptures to support the separation of races,

to support the enslavement of Negroes, and contend the black people are inferior.

Science and religion were used to legitimize racism in the province which reached its peak around 1914. Negroes were not generally accepted in the armed forces during the First World War. A segregated battalion was recruited in Nova Scotia with white officers. The No. 11 Construction Corp was a forest battalion. During the second World War of 1939-46 a new policy was apparently adopted, negro recruits were accepted in all branches of the armed services. However, there was never any way to establish the number of Negro troops. Negroes were never officially recognized as an ethnic group. As a chaplain in the war of 1939-46 with responsibility for Negro personnel in the three armed services, I could never obtain from any commanding officer a nominal roll of the Negroes on strength. I was always told that there was no way of knowing through the files which men were Negroes. This was to be confirmed by what happened at the close of the war. On discharge, veterans were given the opportunity to apply for a Canadian citizenship certificate. I felt this would be a valuable document to possess, so I applied. After receiving it, I was surprised to note among the various items of description the following: colour-white, complexion-brown. Here we have two extremes; in the first instance, rigid segregation on the basis of race and secondly absolute disregard. The latter would infer that Negroes did not exist.

The Negro in Nova Scotia is an identifiable group. Today's population are descendants of the 1812 refugee slaves from the United States. They are readily identifiable not only because of colour, but because of a historical background of segregation. When brought to Nova Scotia, Negroes were settled in remote communities where they developed their own churches and schools. Time has not resulted in much change in the original communities established over one hundred fifty years ago. If Negroes move into the towns or cities, they usually end up in a ghetto.

The geographical isolation of Negro communities, the racially separated social organizations, such as churches, schools, fraternal societies, and clubs are encouraged by the white society and generally accepted by the Negro population. The fact that the Negro population in Nova Scotia is so neatly contained socially, economically, politically, and

educationally, suggests that the more aggressive and obvious expressions of racism, as expressed through hate propaganda, are not considered necessary to suppress them.

Probably the boldest attempt to overcome this pattern of racial separation has been in the field of education. Whereas ten years ago, there were approximately twenty racially segregated schools in the province; all have been involved at this date in some degree of consolidation resulting in either the complete elimination of the segregated school or in the more remote areas limiting the classes to the first three grades. The objective has been the complete integration of the schools throughout the province. To date, there are only two *de facto* segregated schools and both of these have had the number of grades reduced. The philosophy underlying this move has been to provide equality of educational opportunity for all children regardless of racial background.

The perpetuation of segregated Negro communities has resulted in problems peculiar to these communities and as a consequence remedial programs more or less directed at these problems. These efforts include programs such as the Provincial Education Fund for Negroes, that provides special assistance to Negro students at the secondary, high school, and post-high school levels, much of the efforts of the provincial government's social development program is in Negro communities.

Human rights legislation in Nova Scotia is recognized as being of greater relevance to the Negro population than to any other minority group. The present legislation involves accommodations and employment.

Despite current programs of education and human rights there are evidently debilitating forces that emanate consciously or unconsciously from racism. The results of this pattern of racial relations, which operates in a very subtle manner, are both mental and emotional. Evidence of the destructiveness of this form of racism is seen in the following:

- A) Apparent apathy
- B) Lack of motivation
- C) Acceptance of imposed values
- D) Self-hatred
- E) Withdrawal

There is a growing awareness on the part of Negroes that as a consequence of a process of dehumanization they have been suppressed.

Evidence of this awareness is established by the demand for programs such as the following:

- A) Involving self-help and self-determination.
- B) The development of historical and cultural programs to assist Negroes to understand their past and thus establish their self-identity.
- C) That develop a new image of Negroes as a black race.

The foregoing interpretive historical background, though brief, in an effort to give some indication of the social pressures placed upon Negroes as a consequence of race and some indications of the consequent physical and mental anguish resultant from the inherent racism.

The following excerpts from a paper by Dr. G. A. Rawlyk, for the Dalhousie Institute of Public Affairs, on "The Guysborough Negroes, A Study In Isolation", may well be ascribed to most of the early Negro settlements in Nova Scotia. The Negroes of Guysborough, the north-eastern corner of Nova Scotia, are known as "Loyalist Blacks" who settled in Nova Scotia after the American Revolutionary War. They arrived in the province during 1784.

Rawlyk makes the following observation:

The extreme difficulty of establishing themselves in Nova Scotia was only the first and most immediate of such problems. In the ensuing years, the Negroes throughout Nova Scotia were to be plagued by the combined ravages of crop failure, poverty, starvation, ignorance, and white prejudice. For the Negroes, the migration to Nova Scotia was to result in a grim adventure in an alien world... It appears, moreover, that racial prejudice was especially intense in the more isolated communities in Nova Scotia.

One of the most important of these settlements was "Niggertown Hill" on the fringe of what would be known as Guysborough. In 1830, Captain W. Moorsom, a British traveller who had visited Guysborough County and other sections of Nova Scotia observed. Scarcely does a winter pass without the distressed situation of the Negroes coming under the consideration and relief of the legislature. Their potato crop fails; their soil is said

to be incapable of supporting them and disease makes fearful ravages... the Negro settlements continue with numbers gradually diminishing, in summer miserable and in winter starving. Their origin, their story, and their condition, thus contribute to shed an almost romantic halo around them; and the first question put to anyone who has returned from their neighborhood is sure to be—"How are the poor blacks?"

In 1869 it was reported with reference to the community of Tracadie: no school house—no leaders; aid will be required to enable the people to get up a building. I have no doubt of their willingness to assist in labour—but they cannot pay in money.

One hundred years later an item appeared in the Saturday, March 15, 1969 issue of the Toronto *Daily Star*, with the following caption: "Black Squalor—Amid Nova Scotia Pines." The article continued "North Preston, Nova Scotia—Two miles off Nova Scotia's Highway 7, down a muddy, pot-holed dirt road—and just 12 miles from downtown Halifax—is a squalor and poverty that Toronto's Cabbagetown never knew." The question arises whether it is by accident or by design that human beings have been kept in a state of psychological and physical poverty. It is my firm conviction that it has not been an accident, rather a persistent and tenacious pattern of racism that has pursued a policy of dehumanization which has demoralized and held Negroes in subjection and second-class citizenship for well over one hundred fifty years.

In previous correspondence with reference to Bill S-21, I suggested that section 267A, clause (2) sub-section b "causing serious bodily or mental harm to members of the group", was relevant for the eighteen thousand Negroes in Nova Scotia, particularly the aspect of mental harm. Studies made of four year old pre-schoolers established that by this early age black children have developed a sense of inferiority, as a consequence of their colour.

The greatest problem and source of mental anguish for Negroes in Canada is that they have not been officially recognized as one of the ethnic groups comprising our pluralistic society, in spite of the fact that there are fifty to sixty thousand black people in Canada today.

An example is to be seen in an article published in the *Dalhousie Review*, the winter of 1968-69 by Wsevolod W. Isojiw, entitled, "The Process of Social Integration".

The Canadian Example: The problem of civil rights, however, can arise when some minority groups do not attain the same educational level as the rest of the society or do not keep on a par with the occupational changes taking place in the total society. It is characteristic of modern "pluralistic" societies that some ethnic groups attain educational levels higher than the societal average, whereas others fall behind in general rise in school and occupational attainment. In Canada, the three groups which have been consistently and substantially below the general level are the Indians and Eskimos, the Italians and the French; those consistently above the general level, the Jewish, the British, and to some extent the Asians. The question arises: What consideration has been given to the Negro Canadian? How is he to be involved in social integration? This is a paper by a social scientist, it has the prestige of being published by a renowned University, but what does it do with black people in Canada? This is an example of institutionalized racism.

As a chaplain in the Canadian Armed Forces during the war of 1939-46, I was shocked to note that in all the official messages recognizing the gallantry of our servicemen, recognition was given to the contributions of every ethnic group in Canada except the Negro. I recalled the number of occasions I was called upon to console a Negro mother whose son had paid the supreme sacrifice or the hours I spent in the hospitals with Negro men of the Armed Services and the merchant navy and then to find that in specifically naming each group the Negro was omitted.

Kyle Haseldene in his book, *The Racial Problem in the Christian Perspective*, refers to this as the denial of the "Right to be".

I have suggested that all of the mental cruelty, the discrimination, the segregation, has had as its fundamental goal the suppression of black people to an inferior status among men. How has this process of dehumanization been perpetuated?

First: Person to person. There can be no controls imposed upon conversations within a homogeneous group. The content of their discussions will be determined by their personal attitudes. None of us know how even our friends refer to us in our absence.

Secondly: Person to institution. Many clubs and organizations have restricted membership based on race or colour.

Thirdly: The indiscriminate release of socio-economic surveys, which border on the invasion of the privacy of the individual family, often serve to create a negative image of black people. Other groups are strong enough to protect themselves from this form of exploitation and genocide. It has been said that once you have developed the technique you can "Nigerize" any group, old age, trade unions, etc. Negro communities have for years been sociological laboratories and the subjects of feasibility studies, however, they have failed to receive the benefits.

Fourthly: Social problems confronted by minority groups such as Indians, Eskimos and Negroes are generally not covered by the mass media with the same delicacy and sensitivity as is the case of problems within the majority group.

The argument is often used that the objective is to be sensational in order to attract attention. Unfortunately this is rarely accompanied by positive and long term planning. The result is that minority groups become looked upon as homogeneous indigents and are consigned to a caste system.

Hate propaganda may be disseminated through the printed word. However, there are other means more subtle, yet none the less destructive.

In Nova Scotia we are confronted with the obvious. Today, at the time of writing, I learned of a black medical doctor who was arrested while talking with a friend in his parked car, because he objected to being addressed as "Boy". In the course of the arrest, he was physically abused by the arresting officer.

Two days following a full page of pictures and articles on the deplorable conditions in a particular Negro community, three homes in that community were destroyed by fire. It has been confidentially reported that the fires were set by a nine year old girl. Could this be her reaction to the adverse publicity in the press, radio and television? She is now receiving psychiatric treatment. Maybe the psychiatrist will be able to tell us what happens to minorities and the poor who are subjects of what is claimed to be legitimate journalism.

Gentlemen, I have brought along with me Appendix "A", and Appendix "B" to the reports that I have given you.

The Chairman: Could you tell us what is in them?

Dr. Oliver: Yes. Appendix "A", is an excerpt from a report that was compiled by the Director of Employment for Negro students in the City of Halifax during a three month period last summer.

His task was to place the Negro students in employment. He placed some 128 but in addition to the placement he was to do a study and to analyze problems such as what made it difficult for negroes to receive employment. I have here excerpts of the answers that these personnel managers and managers gave as to their reasons why they were not accepting negroes for employment. For instance:

"You're asking us to accept a new style of life, that is, accepting Negroes to work. Do you feel that is right?"

"We had a bad incident here twelve years ago, involving a Negro and a white; and ever since then, I haven't wanted to hire Negroes. But, it has come down from 'The Top' (manager) to hire four Negroes this summer."

"1 per cent of our staff is Negro, I feel that's enough."

—Personnel Manager

"I had a rough experience a number of years ago. I fired a Negro for drinking. He raised the 'red Flag' on me and started calling discrimination. Because of that, I've been a little leary of hiring Negroes..."

"My policy has always been open—but I just have second thoughts about hiring Negroes."

—Personnel Manager

"I don't want any sluts—That goes for white and Negro!"

—Manager

"Our policy is open. We had one Negro applicant, and he had satisfactory qualification."

"To be honest, I haven't given any thought to hiring a Negro."

—Assistant Manager

"In employing one of your chaps, I expect that person to be above average.

He would have to be able to tolerate the remarks, which I feel he would receive from his fellow workers."

"I seem to feel that my community is racist in some of its ideas. In fact, I know there's real bigotry in certain sections of this area."

"I've heard some of the employees talk about Negroes, and often I've heard the term 'nigger, black so and so', etc., used."

—Personnel Manager

"I don't give a damn about the colour of somebody's skin. If they can do the job and are clean, then that person's for me."

"I judge a person by his personality and character, not by his colour."

"Let's face it, Mr. Oliver, I know that there are a lot of companies that discriminate against the Negro. A white boy walks in here, asks for a job, says his father is so and so, he'll get the job. A Negro walks in and asks for a job, the odds are ten to one, he won't get it."

—Manager

"I think my husband would prefer a coloured chap to clean out the well, because coloured chaps are such good workers."

—Mrs. Joe Public

"Before I hire Negroes you have to teach them to wash. They have a body odor that's stronger than any white man's. Don't you agree?"

—Personnel Manager

"The first thing I look for in a Negro is honesty, reliability, and cleanliness."

—Personnel Manager

"As long as he can do the job, that's all I'm concerned with."

—Assistant Manager

"I am not prejudiced, some of my best friends are Negroes."

—Personnel Manager

Appendix B relates to the matter of the existence of the black people. There are two clippings. One is on the merits of education. Again there is also the matter of offensive references in textbooks, where the teachers'

union of the Province of Nova Scotia has petitioned the Minister of Education to have certain texts removed because of the negative references to minority groups.

The Chairman: Thank you, doctor, I am sure that we have all been touched very intimately by the recitation of the condition of the negroes in Nova Scotia and elsewhere.

I note your references to racism and the evil results of it. Would you mind now addressing yourself to the bill that is before the committee? I know that you appreciate the analogies and the references to the bill in the course of your remarks, but would you consider the proposal made in this bill and give us your views with regard to that?

Senator Choquette: Before that, Mr. Chairman, I have listened with great interest to the brief presented and I looked at the Appendices "A" and "B". So far all I can see is evidence of discrimination against this group.

We might ask point blank of this witness if he has studied the bill in question and how this bill would help solve the problem of discrimination against his people? I fail to see it so far.

The Chairman: Your question and mine are practically identical.

Senator Choquette: Yes.

The Chairman: So let us hear from the doctor as to what he has to say about the bill?

Dr. Oliver: I think you will recall in the course of the brief I suggested that I was concerned with the bill's reference to mental anguish and distress, and I suggested that this had relevance. Now, the broad, overall implication of the bill is to make it impossible or difficult for people to slander any particular group, to attack them through the press through hate propaganda. I have suggested to you that although there is not a great deal of evidence of this as such today, this is simply because our particular group is not strong enough, is not exerting, is not threatening the system. This is an extreme hate propaganda effort on the part of those who are trying to suppress others, and the negro does not come within that category.

I see this piece of legislation as an ounce of prevention; an ounce of prevention is better than a pound of cure. I suggest to you it is relevant today because black people are not

going to be content to stay in the passive and apathetic position that they are in at the present moment. They are moving from second-class citizenship to first-class citizenship, and I suggest to you that hate propaganda is a suppressive tool and will be used upon black people or any people who threaten the status of this particular group.

So it is in this vein I try to express to you where we stand and the type of mind that uses hate propaganda and the attitudes that are necessary. It is on this basis that, as the negro grows stronger, if we are going to say that all peoples in Canada have a free opportunity to develop and to grow, we must ensure that it is all practically impossible for them to use negative forces such as hate propaganda. The only way that you can ensure this is through some form of legislation.

The Chairman: That is to say, at the present moment the negro is not competitive in your society?

Dr. Oliver: That is right.

The Chairman: But you expect in the course of time and, I hope, very shortly that he will be competitive and that at that time you feel he would be more in need of the protection of this bill than he is at the moment?

Dr. Oliver: He would be more subject to hate propaganda.

The Chairman: You have read the bill, have you?

Dr. Oliver: Yes, sir.

The Chairman: And generally does it meet with your approval or disapproval?

Dr. Oliver: It meets with my approval.

The Chairman: It meets with your approval; you would like to see it passed into law?

Dr. Oliver: Yes.

The Chairman: Do you feel it would do some good for your people, the black men of Nova Scotia?

Dr. Oliver: On the basis which I have already explained, in that concept. As people grow and develop and become a threat, man uses all types of forces to suppress him. You have to accept this.

The Chairman: Senators, are there some questions to be asked?

Senator Hollett: Did you have any competition in arriving at the peak of your profession? Did you have any anti—I will not say hate, but did you have people who wished you would not get up there? I mean, you competed with the white man as well as other black men and you arrived at the top of your profession, did you not?

Dr. Oliver: I have had my personal problems.

Senator Hollett: I know. We have all had our personal problems.

Dr. Oliver: As a consequence of colour.

Senator Hollett: Did you find any hate or discrimination against you?

Dr. Oliver: Oh, yes. It would be very naive for me to say no.

Senator Hollett: I mean from white people?

Dr. Oliver: Oh, yes.

Senator Hollett: You did, but you made it?

Dr. Oliver: Yes, because everybody is not alike.

Senator Hollett: No, naturally.

Dr. Oliver: Where you had one enemy you probably had two friends.

Senator Hollett: I must say, though, I do not agree with you on this bill. I do not think it is necessary at all. I have said that before, and Mr. Chairman will appreciate that. I do not agree that this bill would be of any service whatsoever. It will only make things worse, in my opinion.

Senator Aseltine: Doctor, you have not given us any evidence of hate propaganda with regard to the Negro race in Nova Scotia, or any place else in Canada.

Dr. Oliver: I have stated my position.

Senator Choquette: Is the human rights legislation very active in your province?

Dr. Oliver: Yes; we have human rights legislation. It deals with fair accommodation and fair employment.

Senator Choquette: Do you not think that legislation will deal with the problems you

have outlined to us, namely, discrimination against your group?

Dr. Oliver: If you will, sir, I have cited the cases of discrimination to indicate the nature of racism. I suggest to you that a racist society uses its forces to the extent of need, and if black people were a real threat, became more of an economic or political threat, you would see the market flooded with hate propaganda.

We are getting it now in subtle ways, person to person; you get it through institutions and this sort of thing, but if my cows are all behind the fence I am not going to need to do anything.

Senator McGrand: Mr. Chairman, is there evidence of discrimination? I see in Appendix "A" one report which says:

Our policy is open. We had one negro applicant, and he had satisfactory qualifications. To be honest, I have not given any thought to hiring a Negro.

His mind is made up; he is not going to hire one. I think that in reading that cover you would get the impression that there was discrimination.

Senator Hollett: But could that not also mean he had not given any thought to not hiring one?

Senator Prowse: How would you interpret the words, "To be honest, I have not given any thought to hiring a Negro"? Do you take that to mean he was not thinking either yes or no as far as the Negro was concerned, that he was looking for a qualified person regardless of colour? Is that the interpretation you would put on that?

Dr. Oliver: This time he just had not thought about the problems of black people. This is the whole thing that goes all through this paper—the black man does not even exist.

Senator Walker: Will this draft legislation, the hate bill, help the circumstances you describe? You have your remedy in the human rights bill, which I understand you are delighted with in Nova Scotia. How can this bill that we have before us now help you?

Dr. Oliver: Well, sir, if there is no protection under the law whereby people could publish anything they like about any particular group, the small population of 60,000 blacks in Canada stand in a very open position, a vulnerable position. I would suggest to you that the cause of black people is becom-

ing of greater significance, not only in this country but on the entire continent. If we do not have legislation to protect what is written, the published word can do tremendous evils.

If you can take a whole group and slander them—I suggest you look at some of the philosophies that existed a hundred years ago, when you could even interpret the scriptures and put out publications diminishing a particular race, when you could twist scientific knowledge and use it to the detriment of people. That is not justice, and our laws should be to uphold justice.

Senator Walker: We would like some indication as to where you need this outside the Criminal Code and the human rights legislation that you have? If you have any condition, circumstances or happening where you could indicate the needs for this, let us have it.

We have not heard any; we do not know of any prejudice against you Negroes. There may be, but I suggest that if there is why do you not get your remedy under the Criminal Code, which is very, very complete, and under the human rights legislation? I do not expect you to answer that, because I do not think you can.

The Chairman: The witness is not a lawyer to begin with, but he has got a great experience in life.

Dr. Oliver: I was just wondering if the senator would explain what he meant, that he does not see where black people in Canada are discriminated against? I wonder if you meant that?

Senator Walker: What I mean is that there is certainly no prejudice as far as I know. There may be discrimination down in Nova Scotia; I do not know about that, but we have nothing but goodwill for the Negroes as far as I know. In Upper Canada, in any event, I have not seen anything which would indicate any ill will against the negroes.

Senator Cook: Mr. Chairman, it is possible that the doctor is better qualified to answer that question than Senator Walker.

Senator Prowse: He mentioned that they have civil rights legislation in Nova Scotia. I would think that if there were no discrimination and had been no discrimination there would be no need for civil rights legislation.

Do you feel that the civil rights legislation was the result of the existence of an obvious situation that cried for a remedy?

Dr. Oliver: Yes.

Senator Prowse: And you suggest that this legislation will meet a problem which we will be faced with as soon as these people taking advantage of the civil rights legislation become equally aggressive and equal competitors in the society. Does that set your position fairly?

Dr. Oliver: The point is that the oppressor is only going to use as much force as he is compelled to use. I suggest to you that hate propaganda is one of the powerful weapons. He does not use that until he really has to, because he has to expose himself. If he can do it by more subtle means, if he can keep all the black people of Canada as second-class citizens without exposing his own attitudes, he will do it. It takes a bit of strength.

Senator Hollett: In that case your opinion of the white man is not very good?

Dr. Oliver: I have to recognize facts.

Senator Hollett: You have no facts to back it up.

Dr. Oliver: I have not come here to debate the entire issues of discrimination, but I do know enough about the economic and the social status of black people if you are asking me about that. Of all our population, we are the lowest on the economic pole. We have no political voice, and in terms of employment opportunity—and even education—we are at the bottom of the scale throughout the nation. No one can convince me that this is because of some innate inadequacies of the black people, of a peculiar race. It is a social setting. He is a product of his environment.

I am not suggesting that you can legislate to adjust and to correct inadequacies, nor am I suggesting that we can say that we are without blame, that we have no guilt and we can just bury our heads and see nothing. The black man is not even accorded the "right to be"; he just does not exist in some parts of this continent, nobody ever recognized that there were black people around until they heard that Stokely Carmichael was coming to town.

Senator Prowse: How do you reconcile the fact that Lincoln Alexander is a member of the House of Commons?

Dr. Oliver: That is just one example, but I do not think the honourable member looks upon himself as being a representative of the black people; he just looks upon himself as being a representative.

Senator Urquhart: What about George Davis, who has the equivalent rank of a deputy minister in Nova Scotia, who two weeks ago was appointed registrar of joint stock companies for Nova Scotia?

Dr. Oliver: Well, that is two out of 60,000.

Senator Urquhart: Well, you are getting there.

Senator Walker: What about you, Dr. Oliver, if you ran? Have you ever run?

Dr. Oliver: Oh, no.

Senator Walker: You would be a very good candidate. Do you think that prejudice would keep you from being elected? It would not in Ontario.

Dr. Oliver: I am not talking about myself as an individual, sir.

Senator Walker: Well, I am.

Dr. Oliver: I am talking in terms of a group of people and in Nova Scotia there are 18,000 and they are not as I see it and as many others see it progressing as well as other groups. We watch white immigrants coming to this country through our ports, and in 20 years they move from one stage to the other.

Senator Urquhart: Dr. A. Calder, a Negro, was a very prominent physician and surgeon in Sydney. There was never any discrimination against him. He was highly respected in the community and had many white people as his patients as well as black.

Dr. Oliver: I could not come here, sir, and say that there is no racial prejudice. We have to face the facts.

Senator Hollett: Is that not innate in all human beings throughout the world, and does a miserable little bill like this cure it? It will make it worse in my humble opinion.

The Chairman: Honourable senators, we are interested now in the opinions of the witness.

Senator Hollett: Thank you very much; in that case I shall retire.

Senator Smith: Mr. Chairman, as a Nova Scotian I had the privilege of growing up with quite a number of coloured people. There has been a lot of emphasis placed on this word "discrimination" with respect to coloured people in my province. Now, I recognize that there is a very serious pocket of discrimination in the North Preston area of Halifax, and I am aware that conditions are disgraceful in other sections of the city. We should all be ashamed of this, of course, but at the same time there are white people in various parts of Nova Scotia who are also living in disgraceful conditions, conditions which should not be tolerated at all.

In the town in which I live there has always been a rather substantial population of coloured people. We have always called them negroes and they have never indicated to me that they objected to that word, so I will continue to use it.

The community has to have contact with other groups in order to understand them, and because our community of negroes in my home town have lived there for, well, as long as our history, we have not only grown accustomed to them, but we have grown not to discriminate against them.

I would like to illustrate, if you will permit me another minute or so, just what I am talking about. Approximately six months ago the new Legion Hall in Liverpool was filled with hundreds of people who had gathered for a special dinner sponsored by the service clubs, the Masonic Lodge, and the Canadian Legion itself. These people had gathered to do honour to a rather uneducated negro who over this whole life had shown great humanity and kindness to his fellow man.

When they had got through paying tribute to him, which was led by a high-ranking air force officer there was hardly a dry eye in the audience. To climax the evening they presented him with an expensive electric organ—he is an accomplished musician.

The Negroes used to have their own church when I was a boy there, but they do not have it any more. They go to church about as frequently as most of us do; they go to the United Church, at which I am an occasional attendant. This same gentleman sings in the choir, and any other black man with a good voice could make it too. There are Negro groups within our church. When I have gone to the Church of England, one of the leading singers in the choir has been a coloured lady. The assistant manager of a leading depart-

ment store in our community is a coloured man. A friend of mine wanted to sponsor him through university, but he chose to go into business.

I am only giving these instances of non-discrimination to point out that this is not a subject or an area about which we should generalize. I hope that our members will not go away from this meeting with the idea that all Nova Scotians are prejudiced against Negroes, and that their life is an intolerable one.

We have heroes among my friends in Liverpool; there are athletic heroes and there are war heroes. Their names are just as honoured as that of any white boy I have ever known there.

None of this is in opposition to what Dr. Oliver has said, and I want to wind up my little speech by saying that he is a very honourable man. He is to be honoured for the very responsible attitude he has taken in doing his best to solve some of the negro problems that do exist in my own province. His contribution makes for a much better understanding than that of other people who

are interested in the subject but who are on the other end of the scale.

It was a disgusting experience for some of us to have to listen to a tape recording of a speech made by one Rocky Jones at Acadian University at one time. It was filled with four-letter words.

Dr. Oliver, I think that we all should thank you for coming here and telling your side of the story in the moderate way you have.

Hon. Senators: Hear, hear.

The Chairman: Honourable senators, we must adjourn now to attend the sitting of the house. May I close the meeting by thanking the speaker, our honoured guest of today, and telling him how impressive he has been. Senator Smith has already expressed, I am sure, the thoughts of all of us. Dr. Oliver was expected here yesterday but he was fog-bound, so we have had a special meeting to hear him today. I can assure him that what he has said has sunk very deeply in our minds. Thank you, doctor.

The committee adjourned.



First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE
ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 11

Eleventh Proceedings on Bill S-21,

intituled:

An Act to amend the Criminal Code".

THURSDAY, MAY 1st, 1969

WITNESSES:

The Very Rev. Ernest Marshall Howse, in person; Dr. D. L. Michael, in person; Professor Maxwell Cohen, McGill University, Montreal, Quebec.

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Gouin	McGrand
Aseltine	Grosart	Méthot
Bélisle	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly (<i>Ottawa West</i>)	Hollett	Roebuck
Cook	Lamontagne	Smith
Croll	Lang	Thompson
Eudes	Langlois	Urquhart
Everett	Macdonald (<i>Cape</i>	Walker
Fergusson	<i>Breton</i>)	White
*Flynn	*Martin	Willis

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—

Resolved in the affirmative."

Extracts from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

"With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary for the foregoing purposes, at such rates of remuneration and reimbursement as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extracts from the Minutes of the Proceedings of the Senate, Tuesday, March 11th, 1969:

“With leave of the Senate,
The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

Extracts from the Minutes of the Proceedings of the Senate of Canada, Tuesday, 22nd April, 1969:

“With leave of the Senate,
The Honourable Senator McDonald moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators Giguère and McElman be removed from the list of Senators serving on the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

The Honourable Senator McDonald, moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators McGrand and Smith be added to the list of Senators serving on the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.”

ALCIDE PAQUETTE,
Clerk Assistant.

MINUTES OF PROCEEDINGS

THURSDAY, May 1st, 1969.

Pursuant to adjournment and notice, the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Aseltine, Croll, Eudes, Everett, Haig, Hollett, Lamontagne, Langlois, Macdonald (*Cape Breton*), McGrand, Methot, Phillips (*Rigaud*), Prowse, Smith, Urquhart, Walker, White and Willis.

Present but not of the Committee: The Honourable Senator Isnor.

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

The following witnesses were heard:

The Very Rev. Ernest Marshall Howse, in person;

Dr. D. L. Michael, in person;

Professor Maxwell Cohen, McGill University, Montreal, Quebec.

At 5:30 p.m. the meeting was adjourned at the call of the chairman.

ATTEST:

Marcel Boudreault,
Clerk of the Committee.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS EVIDENCE

Ottawa, Thursday, May 1, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 2 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The Chairman: Honourable senators, I am delighted to see so good an attendance, which is thoroughly deserved, in view of the amount of evidence and the distinguished character of the witnesses who will appear before you.

The first witness I wish to introduce to you is The Very Reverend Ernest Marshall Howse, who was Moderator of the United Church of Canada from 1964 to 66. At the present time he is not an official of the executive, but is pastor of one of the great Toronto churches. He is appearing in his own capacity, and I make that point because other churches will not be represented, this being the last meeting we will have for the hearing of evidence. So, as I say, he is appearing in his capacity as pastor of a church in Toronto, but we cannot help but remember that he has held a very important post in that church and has been a distinguished and outstanding member of the church for many years.

If you will come forward, Dr. Howse, I would like to introduce you to the audience and the audience to you. May I say that I hope we will be able to get through with each one of the witnesses inside an hour. In the meantime, Dr. Howse, you have the audience.

The Very Reverend Ernest Marshall Howse: Mr. Chairman, honourable senators, when Senator Roebuck telephoned me in Toronto, asking me if I would appear before this committee, my response, apart from immediate surprise, was ambivalent.

I have deep sympathy for the aims of the bill, but I wonder whether the bill itself will create more dangers than it cures.

I have contempt, and it is scarcely too strong to say, hatred, both for the vile propaganda which this bill is designed to suppress, and for the malicious fringe groups of fanatics who promote the propaganda. However, I question the wisdom of trying to suppress by law either the popular contempt, shared, properly I think, by myself, the honourable senators and the vast majority of the Canadian public for those fringe groups of fanatics, or the unpopular contempt shared by the fanatics for other groups within the public.

When I first read the draft now before us I came to the conclusion that, though well intentioned, it was unwise and potentially dangerous.

I may say, honourable senators, that since I have read the transcripts of earlier proceedings of this committee—with the exception of the one of yesterday—I have had some of my fears alleviated. From the questions raised by different honourable senators, I infer that this committee would not in any case approve the bill without significant revision of certain of its present phrases—perhaps with the omission of some clauses and the addition of others.

For example, if a bill of this kind were to be approved in principle, then I would agree with the Canadian Jewish Congress, and some other organizations, that the word “religion” should be added to the present words “colour, race and ethnic origin.”

I say that, although personally I think that religion should not be protected even from scurrilous attacks, and that such protection is not necessary, nor desirable, and will almost inevitably do more harm than good.

Yet, while I infer that any bill passed by this committee would be amended from its present text, I am still of the opinion that, though we are dealing with an admitted evil and a repulsive offence, such a bill as this is not a wise or effective way of dealing with the evil.

I am not a lawyer. I do not know whether certain sections of our criminal law need strengthening. I do, however, believe that, if the Canadian Criminal Code does need some strengthening, revision should be made in such fields as criminal libel and incitement to violence.

It should, honourable senators, scarcely be necessary for me to emphasize that such concern as I have about this bill does not arise in any way from sympathy with hate propaganda, or with its sleazy purveyors.

It has been my privilege to have known certain honourable senators on this committee for many years. But, because I have not had the privilege of knowing others, and because, I am sure, I must be completely unknown to some of them, I may, perhaps as a work of supererogation, with your kind permission, make a few personal references.

I count it my good fortune that throughout a long ministry I have been in active association with leaders in the promotion of good will between faiths and races.

My first pastoral charge, after coming back from post-graduate work, was in Beverly Hills, California. At that time, with a group of clergymen and professors from the University of California at Los Angeles, I joined a series of discussions among priests, rabbis, ministers and laymen of the three faiths. This is now commonplace. But recall the setting in the early thirties in California. There were not many such movements. There never had been many such, and we had to meet extensive and unashamed expressions of anti-Semitism.

I did not stay long in Beverly Hills. In 1935—and Senator Haig was in part responsible for my invitation—I came to Winnipeg, just at the time that Hitler's insane star was beginning to come into ascendancy. Canada was still in the neuroses of the depression. And the western countries were all, with colossal stupidity and inhumanity, trying to protect their economies from the invasion of all outsiders and, pointedly, Jewish refugees.

Almost immediately on arrival in Winnipeg I joined with a group of influential citizens, including John W. Dafeo of the *Free Press*, and Sidney Smith, perhaps my closest personal friend for more than twenty-five years, in attempting to create public approval for the reception of refugees.

Probably because of my activity in speaking and writing and arranging public meet-

ings—I remember speaking to a mass meeting, and I suppose Senator Haig does too, in the Auditorium—when a group of concerned citizens organized the Winnipeg branch of the Canadian National Committee on Refugees, although I was young and immature compared with the distinguished Canadians with whom I was working, I was elected president of that committee. I remained president until World War II made its continuance useless. My position during these years is on the record.

After the war had brought this activity to an end I moved to another venture. My late friend, Dr. Ernie Hunter and I together organized the Winnipeg Branch of the Canadian Conference of Christians and Jews—the first time I think such a venture was made in Western Canada. I served as secretary of that venture as long as I was in Winnipeg. And we developed some interesting programmes which at the time were breaking new ground.

As one minor side-line, I may mention that more than twenty-five years ago I invited a Rabbi to preach at a Sunday morning service in Westminster church. I think that this was the first time that such a venture was made in Canada.

In wider fields, some 15 years ago I was one of a group of 25 Christians from throughout the world invited to the first colloquium of Christians and Muslims. In this venture, incidentally, for the first time in Christian history representatives of all four branches of Christendom—Roman Catholics, Coptics, Orthodox and Protestants—sat around the same table in a common venture. Some people said it was a greater miracle to get the Christians together than to get the Muslims to meet them.

Again this venture came to an untimely end. The worsening situation in the Middle East in 1956-57 made it impossible to continue the movement which I had hoped might have developed into a colloquium of Christians, Muslims, and Jews serving as a focus of reconciliation in the Middle East. As an incidental of this movement I had a Muslim sheik—a truly saintly man if I ever met one—preach on Sunday evening at Bloor Street United Church in Toronto. This was, I am sure, the first time in the Western world that a Muslim preached on a Sunday in a Christian church.

My point is this: I have throughout along and varied ministry earnestly endeavoured to

promote not merely tolerance, but, I hope, something more. I came to understand in the beginning of my ministry that the only way to meet another man, of whatever faith, culture, race or colour, with with a mind sensitive to excellence wherever found, and in whatever form, however different from my own.

Such reservations as I have about this proposed Bill are not grounded in any sympathy with the evils it seeks to control. And yet, Mr. Chairman and honourable senators, I may say with some sadness, but with frankness, that I know of other Canadians, equally open-minded, who, because on such issues as this they have ventured to express critical judgment, have been accused of being indifferent to the decimation camps of Europe, or of being anti-Semitic. I am sure that such response has no place in this company, but that it must be reckoned with outside is just a fact of life in Canada today. The residual legacies of ancient hostility which linger in our society are by no means limited to any one source.

To return then to the bill itself, I am sure that as a layman in law—it is interesting for me to be a layman; it is usually the reverse—I can make no technical criticism that cannot be better made by honourable senators who themselves are lawyers. As a layman, however, I suggest to you that, on general principles, I find in the bill several defects and dangers. First of all, I believe that the proposed departure from the traditional pattern, which in our law gives rights to individuals, and the presumed extension of such rights to groups—selected groups only—has not yet received the analysis it deserves, unless it has been in a recent submission that I have not yet read.

The protection that law provides in the fields of libel and defamation—and assault—is given, without distinction, to the individual as an individual. The laws are not written for selected individuals. They are not written for sensitive individuals, or under-sized individuals, or individuals with political influence. They do not make it illegal to libel an Anglo-Saxon or a Frenchman but legal to libel a Jew or a Japanese. The laws are proper, precisely because they apply to all individuals without regard to colour, race, religion or ethnic origin.

But the present bill, defended as providing for groups protection hitherto granted to individuals, introduces a different standard. The new law now proposed does not apply to

all groups equally. Indeed, it does not pretend to apply to most groups within the community. It does not, for example, apply to groups within which hatred and contempt are most acutely felt and where physical danger is most likely, where individuals are most systematically maligned, slandered and threatened—the groups who face each other in labour struggles. What literature is more likely to incite hatred and contempt, or even violence, against clearly identifiable groups than that produced in the midst of a long and bitter strike, where both sides feel themselves threatened? You may well recall the emotionally charged articles written at such times. Words like rats, scabs, finks, blood-suckers, tyrants, goons, crop up in every paragraph, and at times thinly veiled threats that unless the enemy gives way blood may flow in the streets. This bill will provide no protection for the victims of hatred and contempt if they belong to the wrong groups, if they are merely employers, or labour leaders, or strikers themselves.

The law also does not threaten two years in jail to those whose “communicated statements” incite hatred or contempt of our police officers, our military leaders, of separatists or French-Canadians or Les Anglais, or political opponents, or civil servants, or senators.

A Canadian will still be able to make a profession of inciting hatred and contempt against any group he dislikes, except identifiable groups.

Identifiable, of course, is the wrong word. Every group is identifiable. If it were not identifiable it would not be a group. The word meant is “designated”. Certain groups will be designated, and these groups will be protected from hatred and contempt.

If this bill passes, it will still be legal to incite hatred and contempt for the individual in groups A. B. and C; but henceforth illegal to incite hatred and contempt for individuals in groups D. E. and F.

This is indeed a new principle in criminal law, a principle quite different from that of providing protection for individuals.

Clearly the bill is not concerned with hate and contempt as evils in themselves, as bills are concerned with assault or theft as evils in themselves. If hatred and contempt were the evils to be prevented, why make it illegal to promote hatred of race but not illegal to promote hatred of class? Why hatred of an ethnic group but not of a national, or social, or cultural or labour group?

The defence that this law extends to groups the same protection hitherto given to individuals will not stand examination. Protection is given to individuals equally; protection is proposed for groups selectively.

Without drawing any dogmatic line, it would seem to me that whatever protection an individual citizen needs, and can be given in law, he should have by right, as an individual, equally with all other individuals; that he should not acquire further rights as a member of some particular group.

In one respect it seems to me that this bill operates on the principle on which we used to bar Indians from beer parlours, because they were especially vulnerable, and needed special protection. The dignity of the mature individuals revolts against such protection.

Parliament should scrutinize closely any proposal to give to individuals in selected groups rights not given to individuals in all groups.

May I now turn again to the bill. Its first section is 267A. This concerns the advocacy of genocide. But the definition of genocide is exceedingly broad, like the commandments of the Lord. It includes—and, significantly, is not limited to—acts committed with intent to destroy, in whole or in part, any group of persons.

Note these words in themselves: intent to destroy, in whole or in part, any group of persons. The Nazi criminals still at large are one group of persons some people are still seeking with intent to destroy—in whole, not in part. El Fatah is another group which people would like to destroy in whole or in part. These do not concern us; but the references show how dangerously wide-open are the phrases of this bill.

Let us consider the issues that might arise under Section D.

Honourable senators may have fresh in their memories a recent A.P. despatch from Pittsburgh, U.S.A. There Black Power leaders by threats of violence forced a Planned Parenthood Clinic to close for four months. The Black Power spokesman maintained that family planning centres were white institutions for black genocide. The particular despatch was to note that negro women of the neighborhood were more militant than Black Power militants themselves. The black women declared that no group of men—Black Power or not—was going to tell negro women how many babies to have. Black women

opposing black men organized rallies; and they got the clinic reopened.

The point is, Mr. Chairman, that a sensitive minority can think that almost anything is with intent to destroy them. In Manitoba, not long since, social workers who provided Indian women with birth control information were accused by hostile Indians of working with an intent of genocide. In Saskatchewan, a group rebuking the provincial government for not having French taught in the public schools called this genocide.

Genocide is getting to be a word of ready availability.

The dangers in Section D are augmented by other clauses. I mention only Section E.

The sensitivity of many people might make this phrase forbid child welfare societies to cross lines of religion or race in seeking a good home.

The Chairman: Not to destroy the individual or the group. The welfare people would not do that, or be accused of that, would they?

Dr. Howse: As I have just said, I was astonished that in Manitoba, not long since, social workers who provided Indian women with birth control information were accused by hostile Indians of working with an intent of genocide.

My whole point is that sensitive people may well determine that you have an intent of genocide.

If a Child Welfare Society, for example, put a child of Jewish parents in a Roman Catholic home—not a likely thing here—would not some person have dark suspicions that the real intent was to destroy the Jewish community in whole or in part. Might not the same suspicion arise if an Indian child were put in a white home. Are we then back to the hard old bigotry where the denomination and the race of the parent were more important than the welfare of the child?

These are examples of implications to which no responsible committee could be indifferent. But there is a matter more primary than the incidental of the qualifying phrases.

Law, by its very mystique, should itself be honest. If we need a law to protect us against theft, we should have a law designed to prevent theft. If we need a law to protect us from con games, we should have a law to prevent con games. If we need a law to pro-

tect us against genocide, we should properly have a law to prevent genocide. Banning the promotion is simply a part of banning the practice.

But this is not a law to prevent genocide. No Canadian in his right mind, nobody apart from the crack-pot or the insane, advocates genocide. There is no division about genocide in this committee, or anywhere else in Canada. There is, in fact, no credible possibility that Canada will institute genocide, now or at any time in the future, no more possibility than that it will start burning witches in the public square.

To introduce in Canada a law banning the advocacy of genocide has about the same contact with political reality as to introduce a law banning the advocacy of euthanasia at age 60.

In Canada we are not making international law to guard against dangers that did exist under Hitler, or Joshua, and that may, conceivably, still exist in Angola, Nigeria, or Outer Mongolia. We are not making laws for Nazi Germany a generation ago, but for Canada in its second century.

For a company of responsible senators to say that, in their opinion, although Canada has never had such a law in the past, our land is now in such a condition that it becomes expedient for us to create new legislation forbidding the promotion of genocide would be, it seems to me, a slur on Canada, an unnecessary slur. It would be to rush into an unjustified over-reaction to a non-existent peril.

I concede, Mr. Chairman, that this part of the law may not in itself do any positive harm—any more than a law forbidding the advocacy of torture by royal commissions. We are just being urged to pass a law banning the promotion of what we all know is not going to happen.

We all know equally well that the law is not really directed against genocide. It is designed to provide a hook for catching some slippery individuals—admittedly repulsive individuals—and slapping them away in jail.

It seems to me, however, that if there were any persons who advocated, not planned parenthood or adoption procedures, or other practices at which this bill vaguely hints, but genocide in its stark and literal sense, he might need to be put away in an institution for two years or more. But, in that case, the institution to which he should go, should

more properly be not a common jail but a psychiatric ward.

The desire to catch such warped and perverted individuals and send them to jail is the same kind of hard-headed, stupid vindictiveness which used to make society send to jail homosexuals or kleptomaniacs.

As Christopher Fry has said:

“Behind us lie the thousand and the thousand and the thousand years:
And still we use
The cures which never cure.”

It would be more realistic to have a law sending to jail everyone who advocates the use of the atomic bomb.

Section 267B seems to me to move into greater possibilities of misuse. Again I shall not dwell in detail on the individual phrases. But this section, also, has clauses which lawyers on this committee ought to review, particularly as this bill is administered in the section of our courts which used to be presided over by magistrates, and which, despite the change in name from magistrate to judge, is still that that section of the law in which administration is open to the most widely different judgments, and at times, the most amazing differences of presumption.

But again there is a consideration prior to the detail of clauses.

Little reflection is needed to understand how widely varied may be the kinds of communicated statements which do in fact incite hatred or contempt.

To incite, as the dictionary tells us, is to move to action, to stir up, to instigate, to stimulate.

The paradox is, that it is not only bad speeches, speeches intentionally so designed, that incite hatred or contempt. The most necessary word that has to be said in society at the most critical time, may incite the most fanatical hatred.

The speeches of Franklin Delano Roosevelt incited an astonishing intensity of hatred against himself and the group who, in the view of many privileged of that day, turned against their own class.

The speeches of John F. Kennedy, and Robert F. Kennedy, incited hatred. And these men were both shot.

Even the speeches of Martin Luther King, although they are among the noblest utterances of our time, indisputably incited hatred

and contempt of himself and of others, among those who feared, in their own contemptible phrase, "uppity niggers".

The speeches of Jesus incited hatred, and He was sent to a cross.

Further, what is the meaning of communicating statements in a public place? Does that mean producing *The Merchant of Venice*? And may that incite hatred and contempt? Certainly, people have vociferously said so, and tried to ban that play of Shakespeare. Does it mean lending *Oliver Twist* from the public library? Certainly, again, people have vociferously said so.

Does it mean producing *Madame Butterfly* or the *Mikado*? Sensitive Japanese have thought so. Does it mean producing *The Deputy*? Is that disturbing play, written by a Protestant, really designed to incite hatred or contempt of the Pope, or the Roman Catholic Church? Certainly, people have thought so, and I understand that it has not yet been produced in Rome.

As a matter of fact, Mr. Chairman, many people, as competent to judge as most of us here, would say that the most widely circulated and most successful piece of hate literature produced in our generation was the novel "*Exodus*". They charge that, if a book were produced so slanted in the other direction, it would be buried in a storm of denunciation.

The point is not whether the judgment is valid. The point is that there is no way of really deciding. Two judges could give two opinions as different as those from two different psychiatrists in the trial of Sirhan Sirhan.

I said earlier that, if such a bill as this were passed, it should include the word "religion". I made the judgment on the ground that, if the kind of protection it proposes to give were necessary and if religion were omitted, the Jew, for example, could be protected as a member of an ethnic group, but open to attack at the point of his greatest contribution to mankind, the high faith to which our whole civilization is in debt.

I repeat that I do not think that religion needs this protection, but if you think that it does I suggest some lively possibilities.

The mind boggles at their complexity. Obviously, if this Bill were passed making identifiable groups include religious groups, we could then toss into the clink those who circulate the Protocols of Zion. That indeed could be judged as tending to incite hatred and

contempt, among any who might be susceptible to such garbage.

But I recall a vivid headline in a Toronto paper: "Rabbi blames Gospel for fostering hate."

A substantial report, a fairly long report in two columns, quoted the Rabbi as saying that this hatred was deeply lodged in the subconscious of everyone who in tender years has heard the Crucifixion story, and that there lay the deep origin of the Auschwitz gas chambers.

Might this charge create hatred and contempt of Christians? Of course it might, among minds already susceptible to hatred of Christians.

Another article recently quoted a Rabbi in the United States as saying that not only did Christianity promote anti-Semitism, but that it was, in its essence, anti-Semitism. Such statements are as great distortions in one direction as the Protocols of Zion are in the other. But who would advocate throwing the Rabbis in jail? If we had such a law as this on our Statute Books there might just be some who would. Fanaticism is never limited to one side.

Other possibilities follow. For example, among the most publicized items of anti-Semitic propaganda in Toronto was a vituperative attack upon a distinguished Toronto citizen, Rabbi Abraham Feinberg—a man whom I have known for many years, and for whom I have high respect, and, I can say honestly, warm regard. In his life service in Canada he has fought many a good crusade.

In fact, I sided with him even when I did not always agree with him. When he came back from Vietnam some time ago, although I did not agree with him I was one of those who publicly sponsored his appearance in Massey Hall one Sunday evening.

The pamphlet—a contemptible distortion—was called *The Red Rabbi*. About the same time I received in the mail another pamphlet, more expensively and luridly presented, with headlines in red ink, entitled "How Red is the National Council of Churches"? This was specifically American, but it was an equally vituperative attack on all churches in the World Council of Churches. If Honourable Senators here remember Elizabeth Dilling's internationally circulated "*The Red Network*", they will know that no attempt to smear Judaism with Communism was more distorted

than was a good deal of propaganda against the liberal Protestant churches.

I myself have received my share of that literature, much of it personally directed. Perhaps wrongly, I have not kept this. I recall one not so long since describing me as living opulently—so the writer thought—in society like the eels—I think she meant lampreys—which fasten themselves upon the white-fish and suck their blood.

This would be hate literature if directed against a Rabbi. Is it when it is directed against me?

I receive some dillies. I received a long letter some time ago from a lady. It was mainly theological. In the course of it she said, "And I hear you do not believe in hell. Sir, you are in for a surprise."

Roman Catholics here will recall that propaganda equally vicious is directed against the Roman Catholic Church. Now and then I get some of this. Indeed, altogether, I suspect that I have received more scurrilous publications against the Christian churches—Roman Catholic and Protestant—than many a Rabbi has against Judaism. The difference is that I give the propaganda the amount of attention it deserves. I take one glance at it, and throw it in the wastepaper basket.

I think, Mr. Chairman, that if it were generally known that this is all the attention any of it would get, less of it would be distributed. I think that we would do far more towards suppressing such literature if it never received notice than if we give it, as sensitive people too often have, publicity out of all proportion to its significance in our Canadian society.

Honourable Senators may remember that when David Stanley of Scarborough ended six years in the Canadian Nazi Party, he confessed that he was sick of the negative and destructive nonsense he had been circulating. He said that, if he had been ignored, he would have got over his folly much sooner.

The growth of such Nazi sentiment, as there is in Canada, is due, at least in part, to the lurid and exciting publicity provided by people who would have been wise, had they thought sooner of the trash-bin for the literature, than of prison for the writer. And I can think of little more likely to increase hate literature than a few well-publicized attempts to send nonentities to prison, and in the process make them celebrities. That should be

worth at least as much as the banning of a book in Boston.

Section 267B adds the qualification "Where such incitement is likely to lead to a breach of the peace".

Consider what this might mean in practice. It seems to provide that if someone is advancing an unpopular cause, which some other person, acutely sensitive, thinks will expose him to hatred or contempt, then, if the over-agitated person gathers together a gang of his buddies and threatens to beat the speaker to a pulp, the law will move in to arrest, not the mob which is threatening the peace, but the prospective victim.

This tactic, cleverly exploited, could obliquely recruit the courts of the land as reserve allies of a fanatical group, willing to threaten violence to silence an enemy—and we have people who are willing to threaten violence to silence an enemy. This is a pattern which is disturbingly near to the tactics Nazi bullies used against Jewish citizens in Germany and which, in fact, ruthless tyrannies have used against troublesome minorities all through the centuries.

Intimation of possibilities in Canada have already appeared. In Toronto a few years ago, when the wretched trouble-maker, John Beattie, was denied a permit to speak in a public park, he and seven others attempted a silent protest march through the Allen Gardens, carrying a swastika banner and two green maple leaves. As they were walking through the park—I recount the incident as recorded by Dr. Mark MacGuigan—"Suddenly a small group of about twenty men jumped up from park benches, pushed the Nazis, and beat them with their fists, and with their own flagpoles. Beattie was knocked to the ground twice. The police converged immediately, and arrested the men who were being beaten, charging them with unlawful assembly."

According to the *Globe and Mail*, the President of the General Wingate Branch of the Canadian Legion protested to the Mayor that freedom of speech was not freedom of speech for a Nazi. He accused a Controller, who criticized certain aspects of the case, of aiding the Nazis.

This is a dangerous principle. If freedom of speech is not freedom of speech for Nazis, then I would say that it is equally not freedom of speech for Communists. Perhaps in some cases it might not be freedom of speech

for that wretch the strike-breaker, or, in certain company towns, for a striker. It may not be freedom of speech for Jehovah's Witnesses, or for the Latter Day Saints or, in some cases, for a Roman Catholic—imagine if you had a judge with the mind of Ian Paisley—or a Protestant.

Freedom of speech is, of course, not without limit. But we have overdone the analogy of shouting fire in a theatre. Freedom of speech is meaningless unless it is freedom for unpopular or even contemptible opinion. To admit that certain groups in society are "bad guys", and that they may therefore be silenced by assault or by threat, is to open the way for other groups to nominate other "bad guys" who may be silenced by assault or by threat—which is exactly what the Nazis did. It would be a bad day in Canada when we began to silence an individual for an unpopular, or even an obnoxious, opinion, because other individuals—perhaps for their part as intolerant as he—threatened, in advance, to create a riot if he spoke.

Section 2 of 267 again provides an alarming possibility of abuse. Here the law moves, it seems by intent, from public statements to what a man may say in private, in his own home, or his bedroom.

Plain reading of the text makes it apparent that if a person in his own backyard or his home, which is supposed to be his castle, makes a statement, or a gesture, or a sign of some visible representation—whatever that is—that could be interpreted as willfully promoting contempt of an "identifiable group" and if some one—perhaps his wife through spite or anger, or the neighbor's children who overheard—reports these words or reproduces these gestures, to the police, then the law can be set in action, and he can be packed away in the cooler for two years.

Are we moving back again to Nazi Germany with children informing on their parents, and professional informers discovering their victims as they may?

According to this item 2—as a plain reading suggests—a statement, which may well be obnoxious statement, may be made in some private place, perhaps, indeed, in some place where its only consequence was to generate opposition to the statement, and hostility to the person who made it—and yet the speaker, though in private circumstance and with no discernable overt consequence, is guilty of an indictable offence and can be sent to prison for two years.

Honourable senators, it is not inadequate to say that Canadian courts would not so enforce law. If Canadian courts would not so enforce law, Canadian Parliaments ought not to pass laws which invite such enforcement.

It seems to me that the wheel has come full cycle. Thirty years ago, in Quebec, Duplessis passed the notorious Padlock Law—and I spoke against that at the time. Its stated purpose was to crack down on any writing tending to propagate Communism and Bolshevism.

In Quebec at that time no questioner could get any rational consideration of the true nature of the Bill, or the dangers of its sweeping clauses. Every objective consideration of the Act was drowned in emotional references to the blood-bath in Russia, and in tirades against the perils of Bolshevism. The Act could be understood, said its defenders, only by knowing Quebec's horror of Communism. If you opposed the bill, the inference quickly ran, you were soft on Communism, and probably a Communist in disguise.

This bill on hate propaganda, though not a "Padlock Law", yet seems to me to be dangerously vague and susceptible to abuse. And, this time, any question concerning the nature of the bill and the dangers of its clauses is drowned in an emotional tirade against Nazism. How many times have you heard about Hitler?

The ultimate excuse for the bill seems to be that we are fighting in Canada to-day the perils that existed in Germany at the rise of Hitler. Such an assumption shows want of a sense of proportion. To believe that in Canada the fringe fanatics who print their filthy little sheets are harbingers of a new Canadian Hitler is to be panicked into a fear for which there is no adequate cause, and an exaggerated fear is a phobia.

It is tragically true that in Canada tiny groups of perverted individuals do circulate literature that is filthy, malicious, and scurrilous. Much of this literature may be extremely distressing to people who are the victims of the particular attack. Some of the victims at times may be unable to dismiss the vile garbage with the contempt—if contempt be not illegal—which it deserves.

But, hard cases make bad law. Duplessis was not facing a "clear and present" danger of Communism which warranted the despotic measures of the Padlock Law. Even if he had

been, the Padlock Law was not the right way to fight the spread of Communism. Ideas, good or bad, are seldom buried in jail.

And we are not facing any clear and present danger of Nazism—and certainly not of genocide which warrants the sweeping and dangerous measures proposed in this Bill. It may possibly be, as I have suggested, that our Criminal Law needs some strengthening to deal with criminal libel, and speech that does in fact, with clear intent, incite violence—including that which incites violence against crack-pots. Violence, we should recall, is not the proper answer even to the fanatic.

To make laws for Canada's second century, as if we were on the brink of toppling into Communism or Nazism, or needed to ward off genocide, is an unnecessary as to make martial law the normal law of our community life. To pass this bill could mean, as Professor Harry Arthurs, Dean of Osgoode Hall Law School at York University, has said, that in the name of democracy we sacrificed democracy. Let us not illustrate again the old adage that legislation which begins in fear ends in folly.

The police crack-down, or the jail sentence, is a singularly ineffective way of diminishing hatred and contempt. The bigots are bad; but the zealots who would send the bigots to jail may sometimes reveal that they too, are part of the problem, and not part of the answer.

Forty years ago W. E. B. DuBois seemed to be in the U.S.A. the professional spokesman of hatred of the negro for the white man. He once said that he took "mean, almost criminal, and utterly indefensible joy" in hearing of a mob that lynched a white man. Earlier than that, in 1921, in a poem "Darkwater" he wrote:

The white world's vermin and filth:
All the dirt of London
All the scum of New York;
Valiant despoilers of women
And conquerors of unarmed men;
Shameless breeders of bastards,
Drunk with the greed of gold,
Baiting their blood-stained hooks
With cant for the souls of the simple;
Bearing the white man's burden
Of liquor and lust and lies!...
I hate them Oh!
I hate them well,
I hate them Christ!
As I hate hell!
If I were God

I'd sound their knell
This day!

Can you think of any more undiluted hate literature? But does anyone think that the therapeutic response to such hatred and such writing is to send the author to prison? Is it any more likely that effective response to literature now as bitterly directed against an ethnic group instead of all white men, is to send the author to prison?

The most effective strategy to counter either the pathological fanaticism that distributes the smear sheets or the more sophisticated expressions of those prejudices and hostilities that still survive among all groups in our society is not the incarceration of a few annoying individuals. We would be wiser to depend on slower and less compromising methods. We must measure the hatemongers for the sick individuals that they are. And we must endeavour, in sympathetic cooperation, to cultivate in our community a magnanimity of mind that has appreciation for the rich diversity of excellence that is the heritage and treasure of our pluralistic society.

The goal may be difficult to reach. At times some may be discouraged, and others may be bitter. But we shall do little to hasten the process by resorting to a police crackdown. The more excellent way—and almost the only way in dealing with such evils as hatred and contempt and prejudice—is to overcome evil with good. Only by forces stronger than fear can we, in a community varied as all mankind, sustain and nurture such predominance of good-will that old hatreds may gradually die, and that, in our land of goodly heritage, we may fashion at last a society where every man may sit under his own vine and fig tree with none to make him afraid.

The Chairman: Thank you. The senators have listened very carefully and they are now entitled to ask you anything that arises in their minds. Honourable senators, have you any questions to ask the witness? One thing that I would like to point out is that the bill does not refer to religion but refers only to religious groups. It is not a ban on religion or the criticism of religion, but only the restraining of those who would criticize not the religion but the groups who are identifiable by their religious affiliations.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: It is not in the bill as drafted.

Dr. Howse: This is not now in the bill, but my position was that if you had to put in religion or religious groups it is a matter of detail. My personal opinion is that this would do religion or religious groups more harm than good. I believe that if you pass the bill you should put in this distinction, otherwise the Jew could not be attacked as a member of an ethnic group, but he would then be able to be attacked at the point of his greatest contribution to the world his religion.

The Chairman: It is not, of course, an ethnic group, it is not a race. It is a religious group. There is no doubt about that in my mind.

Dr. Howse: This is right.

Senator Hollett: What is the difference between religion and a religious group?

Dr. Howse: I was just using the word generally.

Senator Hollett: I was asking the chairman.

The Chairman: Religion is a theology; the group is the persons who perhaps adhere to that particular brand of theology. An attack on religion is different from an attack on the people who hold that religion.

Senator Prowse: You say in the second last paragraph that the only way to deal with such evils as hatred and contempt and prejudice is to overcome evil with good. Have you read *Nat Turner's Rebellion* by Styron?

Dr. Howse: No. I said by the way, almost the only way. There may have been cases where some things are needed at times.

Senator Prowse: *Nat Turner's Rebellion* was the one rebellion that was carried out by American slaves.

Dr. Howse: Excuse me, I beg your pardon. I started to read that Sunday night and got about the first 40 pages read.

Senator Prowse: I think it is a pity you have not finished it, if I may make that statement. The point that Styron makes and makes very effectively is that once people have been subjected, in a general way, to prejudice at every turn, which destroys their dignity as human beings, they become incapable of reacting the way people who have had more comfortable lives react to kindness, and the kindness gets lost. Now, will you tell me this: how do we do harm to this society of Canada where we have people from some

ethnic backgrounds, many recently arrived under circumstances where they have known excesses which you and I have been spared? How do we do any harm to this nation we are trying to build by saying that in our discussions with one another these types of things shall be taboo? Where is the harm done?

Dr. Howse: "These types of things". What types of things? Where are your limits?

Senator Prowse: Accusing your neighbour is the basis of making the point of proving that you are a little bit better than you believe yourself to be.

Dr. Howse: Is the production of the *Merchant of Venice* one of these means?

Senator Prowse: I think the world could live without the *Merchant of Venice* if it were to do so. Certainly in high school when I received Shakespeare to read I received carefully expurgated copies. I remember this particularly, because I made the mistake of taking the copy of the home library and reading it. One day I got kicked out. I did not know there was an expurgated copy, but no harm was done.

Dr. Howse: But, we cannot pass laws now on the basis of your limited acquaintance of Shakespeare when you were in high school.

Senator Prowse: I am not sure that my limited acquaintance with the works of Shakespeare in high school or having read his plays without the more lusty portions in them made Shakespeare any less helpful to me as a person who had to make a living in this country later. Those portions I could not quote anyway.

Dr. Howse: As a matter of fact, I think the objection to the *Merchant of Venice* is really not understanding, because Shylock is really a great sympathetic figure and I think the more discerning critics have believed all the time the production of that, among people who are not biased to begin with, or who were biased to begin with, would be corrective.

How can you have a man with some of the great speeches of Shylock;

Hath not a Jew eyes? hath not a Jew hands... If you prick us, do we not bleed?

This I believe is a really potent plea against ill feeling to the Jew, and Shylock is the one strong figure in that. He does not break anywhere.

Senator Prowse: Do you honestly believe that anybody is going to lay a charge under this legislation against somebody for circulating an unexpurgated copy of the *Merchant of Venice*?

Dr. Howse: What I point out is that if the law is not going to be administered in this way it should not be made in a way that invites such an enforcement. And what about "The Deputy"? Do not forget there have been people in New York—there already have been attempts to prevent the publication of such things. As I said, even sensitive Japanese have thought that Madame Butterfly and the Mikado were really part of the white man's subconscious contempt. It is very difficult to say what another man might consider to be inviting hatred and contempt, if he feels himself insecure and in a minority group.

Senator Prowse: It is the insecure people of today that we are very concerned about. The whole basis of psychiatry today is our social attempts to cure wrongs, particularly with insecure people. We try to give people security.

Dr. Howse: I would say that you could really ask two psychiatrists and out of those two psychiatrists you would get two different answers.

Senator Prowse: Just a moment. Let me ask you about these things. You have come before this committee and have given some very specific opinions and they are very well put forward, but we are dealing not with a point which is academic but with a practical problem. Is it not true—and you know, certainly, or you would not have written this—that we have a responsibility in society today to try to reassure the insecure?

Dr. Howse: We have a responsibility to assure the insecure, but this is a very wide responsibility, of course, and applies to many insecurities. It does not necessarily follow that we have an obligation to pass this particular law with these particular phrases.

Senator Prowse: Let me put it another way. Can you think of yourself preaching a sermon or speaking to a group anywhere and making a statement that would bring you within the law that we are presently proposing?

Dr. Howse: Why not?

Senator Prowse: Can you think of yourself making a statement in any public place you might care to make it, or even private place,

that would leave you open to prosecution under the law that is being presently proposed?

Dr. Howse: I would not be prosecuted, and everybody knows it, but that is not the point. It is not a question of whether I would be prosecuted or not but would some other little fellow who has not got the same public resources behind him.

Senator Prowse: Then you are saying that our courts do not now treat people equally?

Dr. Howse: Are you saying our courts do?

Senator Prowse: You are the person who made the statement and I am asking you questions.

Dr. Howse: I think I dealt with this before and pointed out that our laws now deal with groups equally. That is their virtue, that is their justification. They will deal with individuals as individuals—not as sensitive individuals, not as insecure individuals, not as undersized individuals, but as individuals. And the proposed law does not deal equally with groups, but only with a certain select number of groups. . .

Senator Prowse: As a matter of fact, it does not deal with groups at all.

Dr. Howse: If you pass it, it does.

Senator Prowse: The law today does not deal with these groups.

Dr. Howse: The law today deals with individuals and the rights of individuals, and it does not give extra rights because they belong to certain designated groups.

Senator Prowse: I presume you are familiar with the McGrath Report and what is in it, that people should be treated equally before the law.

Dr. Howse: I have not read the McGrath Report, or the McRuer Report, although I know Mr. McRuer well.

Senator Prowse: The principle we are dealing with in modern homology is that we have to treat an individual as he appears before us and not just if he were a perfect man. Is that not so?

Dr. Howse: Exactly and when you take a man who wrote that poem, W. E. B. DuBois and put him in prison, do you think that this is a cure?

Senator Prowse: Was he put in prison?

Mr. Howse: No, he was not.

Senator Prowse: You are assuming he could be put in prison today?

Dr. Howse: No, he would not, but if you pass this law he would have to go to prison.

Senator Phillips (Rigaud): Dr. Howse, I would like to identify myself first. My name is Phillips. I am deeply interested in the point of view you put forward, though it is a point of view dissimilar to that which I entertain. I would like to direct this question to you with respect to your last observation on DuBois. You yourself have admitted you are not familiar with the law and certainly are not a jurist. You are assuming that if the law had been enacted, he would have been convicted, under this proposed law, are you not—without being familiar with law or with the judicial process? You are nevertheless saying, with your great experience and background, that DuBois, if he had been accused, would have been convicted?

Senator Choquette: He could have been, if this law had been passed—that is what he is saying.

Dr. Howse: My feeling is that if this law were passed in Canada and if I had been DuBois and wrote this poem afterwards, I would have been terribly scared...

Senator Phillips (Rigaud): That is another matter. I am simply directing myself...

Dr. Howse: I do not want to misunderstand you.

Senator Phillips (Rigaud): ... to the observation you made about DuBois and to the indication that he would have been convicted. I now understand you to say that were this law on the book, DuBois might have been disposed not to write the poem.

Dr. Howse: No, I say that if he wrote it, it would have been hate literature then.

Senator Phillips (Rigaud): Doctor, may I put one more question to you? In your brief you refer to the fact that this bill contemplates so-called legal protections against certain groupings as distinguished from other identifiable groupings such as trade unions, capitalists and the like.

Would you object in principle to a bill which is in principle right, even though in its approach to matters it only covers a particu-

lar grouping instead of covering the whole, if in principle the law was right?

Let me try to clarify my question. If the intent is to make a crime of those who should be guilty of genocide on the proposed definition and if we only include by way of tentative experience A, B, C, D in such grouping and we have not for the present included E, F, G, H, would you regard the law as wrongful or ill advised to meet the cause in its earlier stages of experience if we simply covered the A, B, C, D grouping?

Dr. Howse: I would think that if you pass such a law as that that it would be a dangerous principle. You are already suggesting that we are passing this but this is only to lead on to others. Unless I knew what others it is going to lead on to I would not know.

Senator Phillips (Rigaud): I do not say it would lead on to others, doctor. I simply say that if the law in your opinion would be sound in relationship to A,B,C,D, would you object to that law because it only covered A,B,C,D?

Dr. Howse: I would think it is not a good principle, just as I would think it not a good principle to make a law which would protect certain individuals. I would think it not a good law to pass say a slander law which would protect individuals under five feet.

Senator Phillips (Rigaud): I think I understand you, but would you object to it if you considered it in principle to be sound if it protected A,B,C,D?

Dr. Howse: If I considered it intrinsically sound probably I would not. I am doubtful though whether the principle itself is intrinsically sound.

Senator Phillips (Rigaud): You say you are doubtful whether the principle is sound. To this I react that in your presentation in part you have stated that because the law generally deals with individuals that it is applicable to all. I understood you to say that one of your objections to the genocide section is because it only covers particular groupings and I think you made a very effective presentation forensically.

I say I disagree with you because it only covers particular groupings and not other groupings. I merely react to that formulation by the suggestion that if it is inherently sound and desirable to protect the identifiable groups A,B,C,D by the proposed law, it does

not become undesirable merely because it does not cover other identifiable groupings also.

That is my only question.

Dr. Howse: Is it a question or a statement? Have you got something I should answer?

Senator Phillips (Rigaud): It is a question to you. I put the question to you if you found the law sound in relationship to the identifiable groupings A,B,C,D and there has been the failure to include other groupings, would you still object to legislation covering A,B,C,D?

Dr. Howse: I think it would not be a wise way to proceed, to have laws which specifically protect the Latter Day Saints and Jehovah's Witnesses, but would not protect Jews and Mormons. I think that would be a bad principle.

The Chairman: Honourable senators, I would like to express on behalf of the committee the appreciation we all feel for the well prepared brief we have just heard and the very eloquent language outside of the brief with which it was supported.

Rev. Howse, we appreciate your public interest in coming here and giving us your view in this well thought out and very vigorous presentation of yours. I am sure that all the senators here agree with what I have said.

Now, I think we must go on because we have two more witnesses and unless somebody has something special which they wish to ask I would like to call the next witness.

The next witness will be Dr. Darien Michael, who is somewhat unique. He is not only a theologian, an ordained minister of the Seventh Day Adventists, but he is also a graduate of the law school of Osgoode Hall and is now practising law in the city of Toronto. So, we have a unique combination of the theologian and the lawyer in our next presentation.

I may say that he is very welcome so far as I am concerned, because I have known him most favourably for a good many years. I am sure that you will be interested in what he has to say.

Dr. Darien Michael: Chairman and honourable senators, I owe you an apology for not submitting a brief, but in consultation with you and some other members of the committee with whom I have shared my feelings about

the proposed bill it was felt that I could express some views on this bill without committing them to writing in the form of a brief. I thank you for this indulgence.

First of all, I want to express my appreciation to you, Mr. Chairman, and the members of the committee for permitting me to appear before you this afternoon. I wish also to express at the outset my strong dislike—contempt, if one might use that word—for those that harbor hate in their hearts.

Secondly, I am inclined to feel, with the members of that committee which gave consideration to this subject under the distinguished chairmanship of Dean Maxwell Cohen, that fortunately in Canada the propagation of hate has not reached crisis proportions. I am reassured by that statement that has been made by certain members of that committee.

It is for that reason that I have viewed this bill, and its predecessors in previous sessions, with some genuine concern—concern that prompts mingled feelings, because while on the one hand I have the strongest feelings of disquiet, unhappiness and dislike for expressions of hatred, on the other hand I am equally concerned by any measure that seriously or significantly curtails those freedoms that are so essential to a democratic state or society.

So my preliminary remarks are directed towards the rationale of the bill. I am concerned, first of all, with what we are trying to eliminate and whether the bill will be effective in doing so.

I think we all agree that you cannot legislate conscientious or deep-seated convictions out of people's minds. I am sure that the drafters and supporters of the bill would be the first ones to disclaim that as one of the purposes or objectives of it.

We are dealing then with symptoms, and this really is what the criminal law comes down to. It deals with outward manifestations of conduct, and not with the inner springs that trigger that conduct. We have to recognize that, but what gives me concern is that in our approach to this there is a suggestion that the other methods of education, and of enlightened and creative promotion of the elimination of the expressions of hatred, have apparently proved inadequate.

So we are now down to where we have to provide narrow sanctions for specific acts of hatred. This I find an unhappy conclusion to have to come to about my country. I would

hope that it is not true that our wonderful educational systems, our modern means of communication, have all proved inadequate to combat the virus of hate.

I am concerned, then, when we come, particularly in section 267B, to the suggestion that if someone in discussing or giving expression to a point of view in a vigorous, vehement and acrimonious fashion—possibly in an intemperate way—he may be committing an offence, while the people who threaten violence, who threaten to riot, are not the ones who come within the ambit of this bill. It is the one who is espousing an admittedly unpopular point of view, who is caught. I can see in this bill that it would not be the students who wish to destroy a university, who think nothing of pillaging the computer centre, but it might be the official of the university who criticizes their objectives or their alleged complaints, who could be punished under this measure because he incited a riot.

Rioters then would not be the ones who would occupy the common jail; it would be the university official, who let us concede, might be insensitive to the downtrodden status of the university student, might be callous to the alleged or real discriminations that students are forced to accept in their pursuit of knowledge. So that it is not the student who says that the road to reform is through lawlessness who will be dealt with here; it is the professor. I could cite many other illustrations.

Senator Everett: Would you not agree that they should both be punished?

Dr. Michael: I am not sure that I am that much of a devotee of the penal system in terms of its success in our society, or that our approach to penology has proven that successful in terms of rehabilitation.

Senator Everett: If the act itself is subject to the operation of the Criminal Code, surely inciting to commit the act makes a man just as guilty?

Dr. Michael: It seems to me that we could take a long list of people through history who have espoused various causes, and whose very espousal of those causes prompted vigorous and violent reactions.

It is the defender of the popular cause who is penalized, not the one who breaches the peace. In this case we seem to put the blessing of the law upon the one who breaches the peace, and we say: "That is all right; the

one we are going to get in is this fellow who had the temerity to speak on an unpopular subject."

Senator Everett: But the one who breaches the peace is subject to other provisions of the Code. It may be that this provision does not cover a person who breaches the peace, but there are other provisions in the Code that will.

Dr. Michael: I recognize that there are, but it is interesting to note in the example that was cited by the previous witness that the ones who administered the beating in the park were not prosecuted, but the victim of the beating—and I have no sympathy whatever for him—was the one who was the subject of a good deal of police activity.

Senator Prowse: But was the basis of that decision not the fact that we have always recognized that provocation is a good defence to a violent act? They felt that under the circumstances that provocation would be good defence?

Dr. Michael: My understanding is that we have considered provocation to be some defence, probably in terms of mitigating the gravity of the charge, but I do not think that we would say that it always serves as a complete defence.

Senator Prowse: Depending on the degree of provocation.

Dr. Michael: And I suppose the intensity of the response that is resorted to.

The thing that gives me concern, Mr. Chairman and honourable senators, is that the unpopular advocate can in effect be muzzled by this philosophy. We can shut him up because we can threaten him with imprisonment for two years.

The Chairman: Would you tell us to what section of the Code you are addressing your remarks that includes what you are saying?

Dr. Michael: Section 267B, subsection (1). If, I may move now to specific sections of the bill, I think of the three sections section 267A is the one which I would find myself most easily persuaded to accept, because surely no one today in Canada seriously suggests that the advocacy of genocide is something that should be protected or preserved.

I do not want to indulge in nit-picking, but in subsection (2) "any group of persons"

seems to be a rather wide description. Possibly that could be tightened up.

I share with others a question about subparagraphs (d) and (e).

The Chairman: That is you would suggest we limit "any group" to "a definable group"?

Dr. Michael: That might be more consistent with your terminology throughout.

Subparagraphs (d) and (e) raise questions that again one might find the abuse of these provisions. Those advocating birth control or the placement of children, for instance, outside their religious or racial origins for the sake of getting them into homes could be accused of advocating a form of genocide by people who are unduly sensitive on these matters. That is an accusation that could be made.

Senator Prowse: Let us take that specific example. I think every child welfare department tries to put children into homes that would give them the same religious environment as though their home had continued. I think this is true.

Dr. Michael: I am not so sure that I agree that this is a good policy.

Senator Prowse: This has generally been the practice. The only cases in which they divert from that is when they find they suddenly have a great number of children of a particular religious background for whom no homes of that religion are available. In other words, it is used now always in the alternative. Is that not your experience?

Dr. Michael: I think the tendency has been in recent years not to keep to the religious origin of the child. The difficulty is that it has been so arbitrary. The religious faith of the child is what the mother said her religious faith is.

I think there has been a more relaxed attitude on this lately, but if you were to advocate...

Senator Prowse: But do they not try as far as they can to follow that practice, and divert from it only if there are no suitable homes available where that religious instruction is available; is that not correct?

Dr. Michael: I think that is correct, yes.

The Chairman: Have you taken into consideration these words "with intent to destroy in

whole or in part any group of persons". Would it be possible to charge the welfare people in so placing children with intent to destroy a group of persons?

Dr. Michael: I think it would be possible to charge them. With you I would share the hope that the conviction might be more difficult to achieve than the laying of the charge.

The Chairman: I would think so.

Dr. Michael: But again you have only to appreciate the differences of view of the members of the Bench to appreciate how some might take the view that there was such an intent.

Senator Phillips (Rigaud): Are you not comforted by the word "forcibly" in paragraph (e) as being against your point of view?

Dr. Michael: Of course, any action by a children's aid society is viewed by at least the parents as being forcible.

Senator Phillips (Rigaud): Even when it is done according to law?

Dr. Michael: Even when it is done under authority of the law. In other words, the victims are the ones who determine the action of the accused when they want to lay the complaint. They make the allegation that this has been done forcibly, high-handedly, or arrogantly by these officials.

Senator Prowse: You actually get beyond the investigation stage before laying a charge; the investigation has been completed.

Dr. Michael: This is, of course, a hypothetical situation. This bill is not law yet and how it will operate we do not know.

Senator Prowse: No, but what if they did, from your own experience?

Dr. Michael: I can conceive of situations where the authorities could take this view, perhaps misguided at the time.

Senator Prowse: Would you agree you have to reach for that interpretation, though?

Dr. Michael: I do not think so when you consider, for instance, that dissenting group in Quebec that operated orphanages and retreats—I am not sure I know the name. There was the suggestion that children were being kept there improperly.

Senator Choquette: The Disciples of Love.

Dr. Michael: Thank you, senator. I do not know enough about the organization to know whether it is bona fide or not, but there was concern somewhere about their activities. There was a feeling that they were restraining or keeping children improperly. There was a move to invoke the law against them. So that it can be done, particularly if the accused is the advocate of an unpopular minority position or group.

If I may move to section 267b, I think I have expressed my concern with subsection (1), that the threat of violence by the audience, by the listeners, is sufficient to bring the speaker under the sanction of penalty. What does give me some concern is the fact that the defence available to subsection (2), as set out in subsection (3)—the defence that the statements communicated were true, or that they were relevant to any subject of public interest, the public discussion of which was for the public benefit, and that on reasonable grounds the person believed them to be true—is not available for anyone charged under subsection (1).

The Chairman: Would you be satisfied with subsection (1) if that defence was given to the speaker?

Dr. Michael: I would feel a lot better, Mr. Chairman, if it could be extended there. I would observe that there is a similar defence in subsection (3) of section 246 of the Criminal Code, which deals with blasphemous libel, in these words:

No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.

Of course, here it is confined to an opinion on a religious subject, but perhaps some wording analogous to that in section 246(3) could also be added to the defences.

In other words, there are questions of public concern and discussion that involve racial and ethnic overtones. We are dealing with the Indians in our country, the Metis, the French Canadians, the separatists, if you want to narrow it within that other broader outline, the Eskimos, or any other identifiable group. There are considerations and questions that deal with these people not only in terms of their ethnic and racial grouping but also of other social and economic factors, and such

discussion could be hampered or squelched unless there was some defence that the discussion was in good faith and not predominantly for the purpose of engendering hatred against the group.

Senator Prowse: If that provision was put in there would this remove your objections to this section?

Dr. Michael: Senator, it would help to allay our concern, though I still wish deep down in my heart that there was a better way to cope with the problem of hate than by resort to the Criminal Code. I hate to admit that we are approaching bankruptcy in terms of our moral and educational resources to deal with the problem.

The very distinguished committee that studied this admitted it had not reached endemic proportions, but it certainly would help to write into the bill some safeguards, if that defence and the one in section 246(3) could be analogized or adapted to this section.

The Chairman: Section 246(3), which protects in regard to religion, reads:

No person shall be convicted of an offence under this section for expressing in good faith and in decent language or attempting to establish by argument used in good faith and conveyed in decent language an opinion upon a religious subject.

Would that subsection not apply to the bill which we have before us, which is an amendment to the criminal code?

Dr. Michael: I think it is too narrow as it is worded here, because it is under this section, which is section 246.

Senator Prowse: If it were added to this section it would allay your fears?

Dr. Michael: Yes, I think it would go a long way to allaying or mitigating some of the possible potential for abuse.

You see, honourable senators, I do not have the benefit of as long an acquaintance with the contemporary history of this country as some of you have, but it was not so long ago when we watched groups dealt with under the notorious padlock law. Sometimes there may have been some shred of justification. I think in many cases people dealt with under that law were intemperate in their expressions, were inflammatory. Nonetheless, the highest court of our land struck down the methods by which they were dealt.

I would not like to see those landmark decisions in the field of human rights undermined by this amendment to the Criminal Code and those notable advances that were made, albeit under very provocative circumstances, wiped out by amendments here that would then have shrouded or clothed those actions with the cloak of legitimacy, which I do not think they deserved in those days any more than they do today.

In regard to subsection (5) of section 267B, again I do not wish to indulge in nit picking. The definition of "public place" gives me a little concern. I did not know that it went so far as the bedroom, as was mentioned by the previous witness. We have been told recently that the State has no place in that particular part of the house.

I am just wondering if the definition of "public place" might be a little better. There might be speeches made in a club, where some of our leaders are wont to go at times on invitation to speak. If they were speaking on a current problem that involved racial or ethnic overtones would that be considered a public place?

Senator Prowse: Subsection (5)(a) defines "public place". Does that definition cure your apprehension? Do you have a copy of it in front of you?

Dr. Michael: Yes.

Senator Prowse: It says:

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

That excludes most bedrooms, I would think.

Dr. Michael: That is what I thought until I heard the previous witness. I did not know it was wide enough to include that, but some apparently think it does.

It occurs to me that here again and if your committee sees fit to include "religious groups" in the definition of identifiable group," then naturally "public place" would come to include the synagogue, the church, or the temple, where you might be discussing matters on a purely theoretical or theological plane—which some people feel is rather obtuse at times—which, because it was in a public place, might leave you open to a charge under this section.

Senator Prowse: Then you would have subsection (3) of section 246.

Dr. Michael: Yes, if we could come under subsection (3) of section 246 I think the defence would then be better. It would be clearly a very virulent type of hate-mongering that the act would be dealing with, and it would not be so prone to being stretched to cover legitimate discussion of admittedly controversial issues or questions.

In dealing with section 267c, the forfeiture section, I just express my own concern over the fact that if anyone swears out an information that he has reasonable grounds to believe that a publication is hate propaganda, this immediately brings about its seizure.

The Chairman: No, there has to be an order of the Court.

Dr. Michael: Yes, by a judge who is satisfied by information upon oath. Now, it does not appear that he has to make any personal investigation of the material; he merely has to be satisfied with the information put before him under oath.

Senator Choquette: Doctor, I can tell you that nearly all those who have dealt with that have said that it is a terrible clause, and that they were in favour of the Attorney General of each province deciding whether an order should be made or an application made to a judge. They felt it should not be left to any individual who might feel that should be done.

Dr. Michael: You see, section 267c (1) merely facilitates the immediate seizures. Then there is, of course, provision for the hearing to determine whether it should be forfeited or not.

It is that preliminary step of immediate seizure that concerns me, and I would feel better if the consent of the Attorney General were required so that there would not be any frivolous attempts to seize publications, and so get them out of circulation, and then, by devices well known to members of the profession to which I now belong, prolong the hearing and effectively keep the publication out of circulation—especially in cases where there is doubt that the court will order the forfeiture. Those, honourable senators, are my views, on the section.

Subsection (7), on page 4 of the bill is:

Where an order has been made under this section by a court in a province with respect to one or more copies of a publication...

and so on. It seems to me that it might be just as well if we deleted those last words, "without the consent of the Attorney General". In other words, if there are proceedings under section 267c, this seems to provide that there shall be no concurrent proceedings under section 267A and section 267B unless there is the consent of the Attorney General. If they elect to proceed under section 267c they ought to be precluded from proceeding under the other sections. I think this will deal with the problem. If it is printed matter that is being circulated, and that is what they want to get out of circulation, then this should be sufficient. The other lends itself to the possibility, in some cases, of harassment. It might be said: "We are going to throw the book at this one, but we are going to proceed against the other under section 267c alone."

Senator Prowse: Could we not put the words "with the consent of the Attorney General" right at the beginning of the section? Then we do not need (7) at all, do we, because everything would have to go through his hands, and he could eliminate it?

Dr. Michael: I think I would agree with that.

Mr. Chairman, as a layman, I appreciate this opportunity of expressing some views on this bill. I represent a communion that is a minority group and naturally very sensitive to discrimination, but it is one that is deeply concerned and disturbed by some of the implications of this bill particularly when having regard to events in our recent history.

It is for that reason I have appeared, and not because I differ from the grand objectives of the sponsors and drafters of the bill. I have the highest respect for the very distinguished chairman and the members of the committee that studied the conditions that gave rise to this bill and, of course, I have great respect for all the members of this committee, whose chairman I have known for a good many years. I have admired and respected his espousal of so many issues and matters that have made this a better country. That has made it somewhat difficult for me to come and speak on a matter like this. I appreciate your kindness and patience, but this is how some of us feel. It was felt that we ought to at least share that concern and feeling with you.

I am deeply grateful for your patience and tolerance in hearing me out. I hope I have not made your task more difficult, nor suggested for one moment any lack of support for the

objective to which you are committed in your consideration of this bill. It is one with which we certainly can associate ourselves, even though we may have some deep concerns as to the effectiveness and the suitability of this road towards the goal we see.

Thank you, Mr. Chairman.

The Chairman: Now, Dr. Michael, I want to express on behalf of this whole committee our thanks to you, and our admiration for the presentation you have made. I suggest to you that you may have done more to make this bill workable than some of those who have addressed us in the past.

We thank you for the thought that you have given this matter, the moderate attitude that you have adopted, and the effectiveness of your address.

Senator Phillips (Rigaud): Before you leave I should like to say that from your last remarks, there is not much danger of our revered chairman being classified as a hatermonger?

Dr. Michael: No, there is not. Thank you, Mr. Chairman, and senators.

The Chairman: Now I have the honour to call the last witness that we have planned to hear, Dean Cohen. I do not need to introduce to this audience. He is one of the authors of the report which brought about the introduction of this bill.

Mr. Dean, you have the honour to wrap up the many representations we have heard, and to say the last words, so far as witnesses are concerned, in connection with this bill.

Honourable senators, I introduce to you the Dean of the law school of McGill University.

Dr. Maxwell Cohen, Dean, Faculty of Law, McGill University: Mr. Chairman, and honourable senators, I am honoured to appear before you again. By this time you are so much more knowledgeable about this legislation than I am that it is almost redundant for me to be here.

Indeed, Mr. Chairman, I wonder what service I can render in view of the inspiration I had last year in my debate with Senator Choquette and Senator Lang, who both prodded me so ably and interestingly that I was more eloquent than I normally am,—and normally I am very eloquent.

Under their particular kind of needling I thought we had an extremely constructive debate. I am not so sure, Mr. Chairman, that

I can do better than I did at that time. Indeed, I am going to rely heavily upon the inspiration of that particular meeting, and upon some of the things I said at that time.

I suppose the wisest thing I can do, Mr. Chairman, is try to take an overall look at your hearings and estimate the nature of the criticism that has been levelled at the legislation, and then to the best of my ability try to reply to that criticism.

It seems to me that no good purpose would be served by my attempting to restate in general terms my philosophy about this problem, though necessarily I will have some general statements to make on the philosophy and psychology behind the bill.

If the hearings that I have read, the proceedings, have significance for your recommendations it seems to me that it is because various men of goodwill have come before you and said either "yes" or "no" and said that either this bill is right in principle or wrong, or in detail wrong. I think what you perhaps would find most useful from me is to say, "Here is the gross analysis of the criticism. How do you meet it?"

Well, with that in view let me perhaps structure what I think are the main approaches I shall take in view of the discussion you have had so far. Broadly speaking, of course, anything I say would divide into two main parts, part one, the positive aspects of our report and the proposed bill. I will not speak about that directly. I hope that will come out indirectly from the answering of criticism.

Part two, the specific attacks on the bill and my answers thereto. Now, I have looked at the proceedings fairly carefully and I have come to the conclusion that the attacks on the bill have, broadly speaking, three main categories of ideas. The first category was, I would call, the philosophical-psychological-civil libertarian attack on the bill, a whole network of theoretical assumptions about this kind of legislation as to its validity or invalidity in a democratic society. A very large part of that discussion is very important. Some of it is not as good as the discussion that I had last year with Senator Choquette and Senator Lang, but almost as good, but it remains a fundamental part of the discussion.

A second group of criticisms is what I would call the technical problems of the legislation. The technical problems of the legislation, Mr. Chairman, break down into two

sub-groups; sub-group one, the argument that the present Criminal Code is adequate to meet the kind of problems raised by the report and those who advocate this legislation. Sub-group number two, the present draft bill is defective in a variety of ways. And I should like to deal technically with each of these. The third main class of attack on the bill has to do with what I would call the "*de minimis*" theory. This says the issue is no longer an issue of as great severity in this country as it may have appeared to the Government or the Committee in 1965 when the Committee was created by the late the Honourable Mr. Guy Favreau and that, therefore, the Government of Canada does not face the same sense of urgency and the proposals do not have the same relevance they might have had a few years ago.

It seems to me that I must deal with that, so with your permission, Mr. Chairman, I would like to go through each of these three categories, the philosophical, and the technical category, and the *de minimis* category.

I want to preface what I am going to say by a mixed personal and impersonal comment. I am surprised at some of the language used by some of the opponents of the bill. I am astonished that some, who have devoted their lives to civil libertarian, or the appearance of civil libertarian, activities would, in fact, describe the report as a Jewish report, as if it were dominated by one or more persons of a given ethnic, religious or ideological standpoint.

I would have thought this view would have no place in the present debate whatever. The composition of the committee was, in my opinion, beyond reproach, in terms of its impartiality, its devotion and its overall competence. There is no man in that committee from the present Prime Minister to the Abbé Dion, to the then Principal of Queen's University who would not have commanded respect in his own sphere of professional competence.

For anyone to suggest that the bill reflects the mind or the standpoint of one ideology, one religious grouping or one particular "axe-grinding" point of view, is a quite disgraceful statement and is totally irresponsible and has no place in these discussions whatever.

I would beg you to ignore that kind of challenge, to your own credulity, to the credibility of the report itself.

Now let me turn to the merits of what I have to say, that is to the philosophical-civil-libertarian attack, first of all.

I suppose that in any such a general statement as I might make, I really could not do better than what is said in the report itself. From moment to moment, I am going to refer to Chapter 2 of the report, which lays the more general foundations for the kind of fears we had as to the nature of free speech in society and the balancing of principles.

I may say, with all due respect, that I have a feeling that many of the critics have never read the report with the kind of eye that a serious document requires. I challenge several of the senior critics here, both from the academic and the non-academic community to satisfy me by the internal evidence of their testimony, which I have read with care, to satisfy me that they really have read the report, that they have looked at the things it said with care, they have read the testimony, that they have looked at the analysis. When you read their briefs, these sound in many cases as if they were written without their having made a serious study of the report itself, as if they were dealing with some abstraction, as if there had not been an immense amount of hard work done in this document which is a self-contained instrument worth some serious historical respect.

So I ask you to be careful when you go over the evidence and to bear in mind my own reaction, that a fair amount of criticism before you was criticism not based upon a reading of the report itself but criticism based upon abstractions, by men of good will, who thought they could do it off the top of their heads and make solid impressions based upon general knowledge and not on details in the report itself.

To come to the philosophical problem, it seems to me that we are dealing here with a typical classical western situation—western in the sense that we are all part of the Anglo-American common-law and Franco-civilian worlds, part of the Judean-Christian world, where it has taken 2,000 years to build up a network of expectations, reliances and values, some of which have been converted into rules of law and some of which have not been converted into such rules. We sense a very large part of our system and we have discovered one very important human social technique; that is, that there are very few

absolutes in the democratic process. The democratic process probably has as an ultimate absolute, the very protection of the democratic process itself.

What is really inviolable is that the central theme of that process survives even though many of the instruments may be reshaped from time to time. Constantly we are rediscovering things, such as, for example, the fact that the taking for granted, as we have for a very long time, that a farmer's vote should be worth five of a city dweller's vote, now should be reshaped. Suddenly, you realize that this is not the democratic process, even though it has been the practice for 150 years. All right. We were wrong for 150 years. Or put it this way: we were right in that time, because the social needs of these generations required, perhaps, a balance between town and country of a different order of magnitude.

So the reshaping of institutions, the rebalancing of interests is a constant part of the democratic process. Therefore, new ideas in the law which seem not to be entirely consonant with what has happened in the past do not mean a challenge to the process. On the contrary they may very well be an advancement of the process itself.

I suggest that this bill, in a philosophical sense, is well within the great western democratic tradition, well within the political syntax, the legal language, the legal traditions we already have. Indeed, it is not possible to read the present Criminal Code of Canada, it is not possible to know something about our struggle for civil liberties over the last 350 years, and not see in this bill a kind of extension of this long process. Far from being a regressive measure, it is instead of fulfilling measure. It is a measure which tries to bring some new balance in a multi-ethnic society like our own.

Let us look upon this, therefore, not as something strange or alien to the Anglo-Canadian tradition or to the Franco-Civilian tradition, of which we are all part in this country, but let us see it as an extension of that great tradition.

The second observation on the philosophical side is that in any case I do not know of any such thing as an absolute liberty. I read some of the evidence with mild surprise, almost even a kind of horrified school master's sense of: "what has happened to the man's education?" Only the fanatic asserts the

absolute. Only those who really have no sense of how men must accommodate to each other would believe that there can be such an overriding principle, except, of course, the principle of the survival of the system itself, the democratic process and its decencies.

We have done this all the time. The movement from licensing in the 18th century, when you could not print a book under British law unless you had a King's Licence, the movement to free speech, which does not begin to mature until the 1830s, 60s and 70s, is a movement which was parallel to a clearer definition of the law of libel; it is close to the evolution of the law of sedition; of the law of blasphemy; and so it is related to many other areas of the criminal and civil law in which a whole network of controls are found that were seemingly consistent with as much freedom of speech as the democratic process, in its time, seemed to require. And so I ask you to see not simply a piece of legislation, saying you shall not print and distribute hate propaganda, but to see it as part of a total network of relationships, a total network of rules, a total network to maximize the opportunities for every individual to play his full role in society, a democratic society such as our own.

And, moreover, we have never had "absolutes" here.

Last year I said to Senator Lang, if you will recall our debate, that there was no one more determined to protect freedom of speech than Mr. Justice Black of the Supreme Court of the United States; and Mr. Justice Black is known as an absolutist on the subject of the first amendment to the U.S. Bill of Rights, the freedom of speech amendment. But Mr. Justice Black himself never intended that to be an absolute, even though he once said he regarded it almost as the overriding norm.

Now we find the Black Arm Bands case which appeared in the United States Supreme Court Reports about six weeks ago dealing with a child in Nebraska who was attending high school and who wore a black arm band to school by way of protesting against the United States policy in Viet Nam. The principal of the school sent the child home and the question came before the Supreme Court as to whether the principal could send the child home as a matter of discipline. The question was could a child wear a black arm band when the principal said no. The majority

opinion was that the child had the right to wear the black arm band and the principal had no right to send him home for doing so. But, honourable senators, read the dissenting opinion by the absolutist in the Supreme Court. He said there are and there must be cases where one must balance the interests of the community against the interests of the individual. This I think highlights the whole process of the democratic process.

Sometimes you do it at the legislative level, sometimes you do it at the administrative level and more often you do it at the judicial level. And I say therefore that one should see this kind of legislation again as part of the historic balance of interests in society and an attempt not to pretend that we are having what the absolutists call absolute freedom of speech or absolute freedom of expression. This has never existed and cannot exist if there is to be a rule of law and not a rule of absolute men.

The third point I want to make is that we are surrounded on all sides by behaviour patterns which are increasingly affected by living under conditions of great tension and density in cities, the impact of the mass media, and there probably is taking place a change in the psychological characteristic of man's behaviour before our very eyes the full nature of which we really have not comprehended. I ask therefore to reflect philosophically for a moment on whether or not you can really take a concept of speech or communication and forget T.V., forget the mass media communication, forget the use of parades forget the whole range of techniques in the protest movements, whether good or bad, and consider whether we in this year, 1969, can be indifferent to the way in which the media have their impact on behaviour and the way the behaviour have its impact on the media. What is to be the legal response to this? Does one sit back in 1969 and pretend that the psychological knowledge we have today about behaviour is no more than they had in 1869? I suggest it is an impossible conclusion. It is an impossible premise to assume that men will not have an insight into their fellowmen's psyche to a degree that will affect his view of what a legal order is about. Let me put it in its bluntest terms. As I said to Senator Choquette a year ago, if you are starting to design a new Criminal Code entirely—if the Government of Canada said tomorrow, "We will wipe out the present

Criminal Code and we will redraft it," would we start with the same psychological assumptions Sir James Stephens had in the 1870s and 80s, when he drafted the Criminal Code for India which became the basis of our Criminal Code in the 1890s, what were the psychological assumptions about crime and punishment which he had in the 1870s and 1880s which are still our main document? With the degree of insight we have now into motivation, communication, the contagious effects of behaviour, into the theory of what is responsible and non-responsible behaviour, surely, we just know more—or to put it more humbly, we think we know more, and probably we do.

The Chairman: We have reason to think we know more.

Dean Cohen: Yes, we have reason to believe we know more. More brains have been devoted to the psychological understanding of behaviour in the past fifty years than in the previous history of mankind, and the literature and the experimentation and the existence of laws and studies and surveys, it seems to me, give us just a little more confidence in our insights. So, philosophically can one really say the older models of criminal law and control of social behaviour, the older standards, would in fact be the only standards we would apply in 1969?

I am going to put it to you, before I conclude my philosophical comments: Is it conceivable that we would not behave differently in fashioning our criminal law if we started from scratch today? It is conceivable that we would start from scratch today without bearing in mind the nature of propaganda and its effects upon the individual, the knowledge that certain types of propaganda under some conditions are very contagious? The enormity of the effects of propaganda in Italy and Germany were an example, and it is no use witnesses telling us that Canada is immune from these things. There is no fundamental difference in the human psyche, whether you are talking of Nazi Germany or Canada. Certainly, political traditions are different and socio-political conditions are profoundly different, but are we going to really say that there is a fundamental human difference in the human being per se in eastern or western Europe, and ourselves? I doubt it.

Senator Lang: Between Nazi Germany and Canada, I draw quite a clear distinction.

Dean Cohen: I am not talking about the countries...

Senator Lang: That was your lead remark.

Dean Cohen: I am talking about the human psyche. It is capable of similar responses. I have only to suggest that a reading of the report...

Senator Everett: You are saying that if the conditions that obtained in Nazi Germany obtained in Canada, the result might very well be the same?

Dean Cohen: Yes, exactly. I attach great guilt to the German leaders, and I have never had any doubts that Nuremberg fundamentally was a sound proceeding; but I have no doubt also that to pretend human beings will not act with great violence under similar conditions, if they are propagandized into it, is false. To pretend that people are not receptive, given certain psychological settings which incite them to violent behaviour, is to deny the validity of the immense amount of knowledge we have, which took place in our own time and which caused so much havoc in the world.

Senator Lang: There was an immense after-effect following the defeat of Germany in 1914-18. We have not had that basic psychological trauma to deal with in Canada.

Dean Cohen: But all you have to do is to listen to the Indians' complaints about white treatment in Canada to know they have a trauma, and they feel the same way about your behaviour and my behaviour towards them for the past 250 years. Just listen to the Indian charges of white genocide and the maltreatment of the Indian population, given the right conditions, in terms of an opportunity to express themselves violently or not. I have sat in round table discussions with the Indians and have seen the sense of injustice explode into the same kind of feeling.

So, you know, I simply say: Let us be humble in the face of new knowledge, and let us not pretend that we would draft in 1969 a document called "The Criminal Code" in the same way as we drafted it in 1869 on some of these issues.

I have two more points on the philosophical side and then I will be through. It seems to me that among the things that emerged from World War II that are inescapable is an overriding sense of what I would call human

indecenty. We can look at the human rights program from 1945 on from a positive aspect or a negative aspect. The positive aspect of the human rights programs is that you enrich and enlarge the opportunities of all persons regardless of sex, colour, religious creed, et cetera, and there is no country on the face of the globe, with the possible exception of South Africa, that has not subscribed to the main tenets of the United Nations Declaration on Human Rights of December, 1948, and many of the collateral documents that flow from it.

But, if you look at it from the other side, it has done something negatively to our conscience. It has given us a feeling for the level of indecenty beyond which civilized man cannot go. I would say that two of the most traumatic of recent human experiences were the discovery of the meaning of the gas chambers in terms of human behaviour, and, secondly, the discovery of what it means to have a colour relationship in which one part of that relationship feels itself to have been permanently abused over a very long period of time. Putting aside the atom bomb, I would say that those two discoveries and their impact upon the human conscience are among the dominant political facts of today.

If you were going to design a new criminal code would you not have in mind the psychological consequences of those experiences? Would you not be influenced by the new human rights standards of today? It seems to me inconceivable that one would begin the process of redesigning the criminal law without having those factors in mind. If that is true, if you can say that you would not design in 1969 a criminal code without bearing in mind all of the human rights or discrimination questions that have arisen post-1945, then why not see it also in the on-going context of criminal law, of which I suggest this bill is a part on both levels.

To put it in its most relevant terms, I see the report of this Committee as part of a screening of ideas that reflect the new level of national and international conscience post-1955. It fits into that stream, and it fits legitimately into that stream.

Senator Lang, I see you smiling.

Senator Lang: Carry on.

Dean Cohen: I would be glad to interrupt and debate this with you, if you wish.

Senator Lang: This is what you call gamesmanship.

Dean Cohen: You will have your moment. So, Mr. Chairman, it seems to me that the level of indecenty that we are accustomed to now, the threshold of indecenty, is lower. The threshold is reached quicker in our own minds than it was three or four generations ago, and our laws must reflect the new threshold of indecenty. If that threshold of indecenty is lower than it was 75 or 80 years ago, it will be the better for mankind. If it means that newspaper editors and preachers have to be more concerned about the effect of their words, then so much the better. Why should not modern civilization be under this new and intelligent inhibition in respect to words and acts that do harm. What is so shameful about admitting that you know words main; that words can do lethal damage to your neighbour and your friend. What is the harm in not only knowing it but also using it intelligently and constructively in your legislation?

Putting it in reverse terms, not to use it intelligently, to pretend that the information does not exist, is doing a national disservice, is closing your eyes and is, at the end of the day, sacrificing the democratic process to an older and dead ideological standard.

Let me also suggest that philosophically the present criminal law of Canada is filled with standards of a so-called minimum order of decency. I would refer only to the present rules about defamation, seditious libel, blasphemy, scurrilous material, obscene language. The Criminal Code is filled with varied efforts to try somehow or other to contain and define the limits of decency. In our report we were going only a step or two in trying to give more coherence, more modernity, to what already was an established series of standards. We were not doing it in a vacuum but in a world context, because 17 other countries in the western world since 1945 have done the same thing. The United Kingdom has tried the same thing more or less, in some ways in stronger legislation, in some areas weaker legislation.

On the non-criminal, civil side we have gone even faster. Practically every province now has non-discrimination legislation of all kinds. Almost every province now has in one way or another made it impossible for employers to discriminate on grounds of race or colour. Similarly there is fair accommoda-

tion legislation. The whole theory of non-discrimination permeates much of our law and much of our thinking, and these particular recommendations in our document, it seems to me, are part of the stream of ideas represented by it.

There is another point on the psychological and philosophical side. I was glad to see what Dr. Howse presented here today and was very interested in one of his comments. However, when one has a presentation which says we must cure the human heart of its capacity for hate and not use legislation, I wonder if one is really aware what that kind of remark means to a vulnerable minority. Is that not too often the standpoint of a reasonably secure majority? Is that not really the way in which you look at the ability to withstand the slings and arrows of outrageous language because you are in a comfortable and secure majority, and therefore your standpoint from which to judge the vulnerability of others is itself far less vulnerable? I suggest there is all the difference in the world between the sense of vulnerability of the historically vulnerable minority and that of the reasonably secure majority; there is all the difference in the world.

We make laws not for one or the other but for all. We make laws, it seems to me, for a decent minimum for all, and we must ask what is the lowest common denominator that serves the best interests of all. Or, to put it as Professor Myers MacDougal has done: what is the system of rules that will give us a minimum order for us all? I suggest that minimum order must come not from the standpoint always of the secure majority, but from the standpoint equally of the vulnerable minority.

A great deal has been said in the proceedings, philosophically, by many of your witnesses, to the effect that you cannot teach the human heart not to hate but you must educate it. I would have thought that argument was over now. Of course you cannot legislate to love. What you can do is to make it awfully hard to be successful at hating openly by actions. You can legislate against the consequence of hating effectively by action. You cannot say to a man "You shall love," but you can indicate it is going to be expensive for him to hate in public and foment hate on the part of others. Therefore, let us not pretend that this legislation achieves only one purpose. It serves at least four different purposes. Law

and legislation are, above all, educative. It is an extraordinary thing. You have a rule in the statute books and the very existence of that rule, as my classmate, Campbell Haig—I hope the honourable senator will remember with me—that the rule is there not only because it is an enforceable instrument mobilizing the coercive power of a state, but equally important, Mr. Chairman, it is there to symbolize what the community believes to be its values. Even if there is a question as to whether all of the community, all the time, believes in that particular value, its very presence inscribed on the books of the law is a constant feed-back into opinion-making.

I will give you a good illustration. I do not know if I used it the last time or not. I imagine when the Fair Employment Practices Act was first passed in Ontario in the late 1940s, that had you taken a poll in Ontario of public opinion at the time of the passage of the legislation as to whether or not they wanted it, I venture to say the results would have been 60 per cent against it and 40 per cent for it, judging by the nature of the public debate that took place at that time. There was not a real powerful demand except for the trade union movement of certain minority groups in the late '40s for fair employment practices. By the time that legislation was on the Ontario books for four, five or 10 years and had you taken a poll then you would have found that the legislation had become the "norm" of the community. They had become accustomed to the way decent lives are led. The educative consequence of the legislation was far more important than the administrative or prosecutory consequences. That seems to me to be a significant lesson for us here, that one should see law, not merely as a coercive, but also as educative in the deepest sense of the term.

Senator Everett: You could admit that that could be for good or bad.

Dean Cohen: That is quite right. I also have to admit that when I take a look at the significance as I said, in terms of the Volstead Act in the United States. I am not always sure where that line of analysis leads.

Some of you may know the work of Fred-eric Wertham the psychiatrist who has done so much work on comic books and their effect on youth and violence. He said that there was a period in recorded history and Egyptian recorded history when incest, brother and

sister marriages and murder, in the sense that homicide, interfamilial for a purpose of the family, was a perfectly understandable practice. These were "norms" acceptable under certain conditions but after a certain time the practices were outlawed. The consequences were that within five hundred years after the first known period of the outlaw of incest it became virtually unknown in most human society.

The Chairman: May I ask the witness what would be the effect, educationally and in the community of our refusing to pass this bill?

Dean Cohen: I am speculating beyond the limits of my competence. You are asking me to make an educated guess as to how public opinion would respond. I would have to answer that in two parts.

The Chairman: What effect it would have?

Dean Cohen: On public opinion?

The Chairman: Yes.

Dean Cohen: I would say that part of public opinion, which is aware and sensitive because it has been the target of much hate propaganda would be deeply distressed at this decision, as a value judgment made by the Parliament of Canada about its willingness to protect their sensibilities. If the answer is that those affected are only a small minority, then the real answer to you to government is, "Do you not care for your small minorities and are you not here because you should be as concerned for the small minority as you are for the secure majority?" It does not matter what the numbers game is. We are not playing a numbers game around this table. We are playing a game of values and the game of values transcends numbers. Of course, if you were to show me that we are dealing with zero personnel, the problem may disappear. But we are not dealing with zero personnel, we are dealing with sufficient numbers who feel vulnerable, to make it socially meaningful.

I challenge anyone to suggest for a moment that just because we are not dealing with many hundreds of thousands, as may very well be the case, that therefore there is no issue.

This anticipates my third class of argument later on, the *de minimis* argument.

It is impossible to argue, with any sense of fairness, that because we are dealing only

with minorities and with relatively small numbers, that we have no problem. It is because they are small and because they are vulnerable that they are entitled to whatever protection you can give them, that is, whatever you can give them consistent with the protection of others. I suggest that there is no real challenge to other values by this kind of legislation, protecting vulnerable minorities. The values of free speech and tough public debate are not in any way affected—as I am prepared to argue point by point on the technical problems of the bill—or are not in any way problems or threats to vigorous opinion and public debate.

Senator Choquette: Do the people in that minority group ever stop to think why they are so vulnerable, everywhere they go?

Dean Cohen: Senator Choquette, I was not talking about any particular minority. I am not sure that I have the significance of your remark.

Senator Choquette: It is in answer to the question put to you by the chairman as to what effect it would have on the education of the people here in Canada, and I think your answer was that the vulnerable group or groups, I do not know how many there are...

The Chairman: The vulnerable minority.

Senator Choquette: . . . would have been depressed at the thought that the majority was not looking after minorities. It is as a result of that answer to the chairman's question, that you gave, that I am asking this question.

Dean Cohen: Well, I do not know which minority you have in mind and I am sure that when I used the words "vulnerable minorities," I meant a great variety of potential minorities, who would come within the phrase identifiable group and who are vulnerable, who are vulnerable today and who should not be vulnerable. There is nothing in their history, there is nothing in their claims to equity, there is nothing in the future good of Canada, which justifies their vulnerability, there is no reason any more than that you or I should be vulnerable, if we are. So I said, senator, I do not know who you are referring to. That is not my business. What is my business is to try to explain, in answer to the chairman's question, whether I think that public opinion would react to that decision not to pass this legislation. I think that part

of the public opinion which is aware of its own vulnerability would be very disturbed. That part of public opinion which is also aware—and there are large numbers of them, because there are large numbers of organizations which support this particular bill—they also would be disappointed.

However, I think there is enough wisdom and enough charity and democracy in this country and here in the Senate, to see that we are dealing with a broad spectrum of a multi-national society, not all of whom are in the same psychological level, not all of whom are on the same economic or political level and we must find at the same time some standard of order which would protect them all, as best we can, in this legislation, and keep them within that stream of protection.

Senator Phillips (Rigaud): I would like you to delete that reference to the people having enough charity, because I belong to a group which is supporting this legislation and I would prefer to feel that we are not receiving any of these benefits on the basis of charity.

Dean Cohen: I was using the word “charity” in its christian sense, so that my ecumenical meaning must be clearly understood.

Senator Lang: Some groups have made presentations to us and have been most vocally opposed to us and they have been minorities—the Jehovah’s Witnesses, the Seventh Day Adventists, and such groups. Really, the ones who seemed most perturbed about this legislation are not the groups that you are speaking of but would come under no other heading than vulnerable minorities. How do you account for that?

Dean Cohen: Well, how do you account for differences of opinion among majorities?

Senator Lang: If you are using this expression “vulnerable minorities”, I think you should qualify it by saying “certain vulnerable minorities”.

Dean Cohen: I will accept that. I must confess, if you are suggesting for one moment, which I think you are, senator, and I think you have a right to, that, for example, the attack by Glen How on the legislation is a good example of a vulnerable minority, the Jehovah’s Witnesses have been the beneficiaries of some very creative legal thinking in this country. Glen How is the last person in the world to talk about the rule of law controlling the human heart, because without the

rule of law controlling the human heart, Glen How’s Jehovah’s Witnesses would have been in a very bad way.

Now that you have opened the subject, I want to state for the record that for him to suggest as he did apparently in this committee that the report was in a sense a heavily Jewish report is, of course, quite disgraceful.

Senator Lang: Is that true, though?

Dean Cohen: I beg your pardon.

Senator Lang: It may be disgraceful, but is that true?

Dean Cohen: It is no more Jewish than Ivan Rand’s judgment in the Boucher case could be called a Jehovah’s Witnesses’ judgment. Put it on that level.

Senator Lang: The question was asked why he made that allegation.

Dean Cohen: Yes.

Senator Lang: His answer was because all or almost all examples given in the Cohen Report were examples of anti-Semitic hate propaganda. I think that is a correct and fair statement.

Senator Choquette: He went so far as to say that 90 per cent of the examples given were of that type, and he could sit down with my colleague to my left here, Senator Phillips (Rigaud), and prove to him that 90 per cent were of that type.

Senator Phillips (Rigaud): You should allow the record to speak for itself. He said that it was 100 per cent Jewish, and when I questioned him he qualified it by saying 90 per cent. When I asked him to be good enough to tell me on what basis it was 90 per cent Jewish, whether it was in terms of content, weight of the pages and all that sort of thing, there was silence in reply to my question.

Dean Cohen: In fairness to Glen How, whom I have known for years and for whom I have great affection, because he has done a magnificent job as counsel for the Jehovah’s Witnesses, I would say that in this particular case he has allowed his judgment to be obscured by what we have done. I do not think that in a responsible moment anybody would try to attach a label to this document. This is not a serious way of discussing a serious report, you know. Either we are serious people or we are not.

Senator Lang: If I may just follow that line of thought, Dean Cohen, and I do not wish to pursue it *ad nauseam*, there are other statements Glen How has made that concern me, although I have no way of knowing whether they are true. For example, he said that the Canadian Jewish Congress had been promoting this legislation since 1963. Is that correct or not?

Dean Cohen: To the best of my knowledge they have given this kind of legislation full support from at least 1962 or 1963 onward. They have given it very strong support. Indeed, there is no doubt in my view that the Canadian Jewish Congress are among the most powerful supporters of this kind of legislation.

The Chairman: How many people do they represent?

Dean Cohen: They are the official spokesmen for the organized Jewish community in Canada, which numbers approximately 250,000 souls. So they represent a not inconsiderable number of people. I would say this about the Canadian Jewish Congress: like all organizations who represent a particular section of the community, their representations must be weighed very carefully. You must always, as I think you are doing very correctly, senator, ask yourself how much reserve must you place upon their representations, in view of the particular interests they have. But having done that, having discounted what they say as much as you like because of its origin, you must then come to the second question, which is the more important question, or whether there is a residue of integrity in what they say, and a residue of integrity so far as what they say relates to this document.

Senator Lang: I am not trying to imply that there is any lack of integrity.

Dean Cohen: Or judgment.

Senator Lang: Or judgment. It is very difficult to be judged on one's cause. That is probably a truism.

Senator Lang: Was Mr. Saul Hayes a member of the Cohen Committee?

Dean Cohen: Yes, he was.

Senator Lang: And was he an officer of the Canadian Jewish Congress?

Dean Cohen: He was.

Senator Lang: Was he not the President of it?

Dean Cohen: No, he was the senior civil servant on the executive.

Senator Lang: Are you a member of the Canadian Jewish Congress?

Dean Cohen: I used to be a member of the executive but I am not any more.

Senator Lang: My questions are relevant in this regard. I think in all the circumstances, if you are emotionally involved in the legislations, the judgment you present here may not be as even handed as it might otherwise be. The same thing might apply to myself; I could be in the same position as Mr. Saul Hayes or anybody else.

Senator Everett: Is it not true to say that you chaired the Commission and that it was widely representative?

Dean Cohen: Yes.

Senator Everett: Were there any other members of the Commission of your faith?

Dean Cohen: No, except for Saul Hayes. There were three Roman Catholics, two Jews and two Protestants.

Senator Everett: So that the conclusion was not just your own conclusion?

Dean Cohen: No.

Senator Lang: Well, this really does not come into the picture.

Dean Cohen: Well, Senator Lang, you have opened the door on this question and you have to face it. You have got to face it with the humour and integrity you are capable of. I want to say this that the membership of that particular committee is such that you have to sit back and say to yourself and decide for yourself what you think of Alec Corry, who was Principal of Queen's University, and what do you think of Pierre Trudeau who was at that time an associate professor of law at Montreal University and what do you think of Father Dion?

Senator Lang: Well, I do not really like to enter into an *ad hominem* argument. I don't think it has a bearing on the issue. I am not speaking about the individuals, but about the objectivity of the committee.

Dean Cohen: Well, I am asking you this, since you are the one who is putting it on the record and asking whether the judgment of the committee might not have been objective. You have been pressing me, and I am entitled to press you. Are you suggesting you have doubts about the impartiality in this matter of Alec Corry? Are you suggesting you have doubts about the impartiality of Father Dion?

Senator Lang: Well, impartiality might not be the right word.

Dean Cohen: Well, what word would you use?

Senator Lang: I think perhaps objectivity would be a better word.

Dean Cohen: Very well then, are you prepared to say that you have doubts about the objectivity of principal J. A. Corry as he then was?

Senator Lang: Well, I think that is really a non sequitur.

Dean Cohen: Well, you have opened the door on this.

Senator Lang: Yes, but you have raised this question.

Senator Phillips (Rigaud): Maybe this is the time to show charity towards Senator Lang and allow Dean Cohen to continue with his presentation.

Senator Lang: I think your presentation this afternoon will substantiate it. I recall an instance some time ago when one of your closest friends and great admirers referred to you as "The Voice".

The Chairman: All right, gentlemen. Let Dean Cohen go on with his presentation, please.

Dean Cohen: Well, I apologize if we have gone off the track.

The Chairman: There is no apology necessary.

Dean Cohen: I want to conclude this phase of what I have to say by making some comments on philosophy. In my opinion the report was also an attempt to make a considerable survey of the history of our law and social system where it affects free speech. It was attempting to be a serious study. It was not as detailed or profound as it might have been but I don't think you can read chapter 2 of

the report without having some sense of the attempt we made to grapple with the fundamental question of free speech *per se*.

Finally, I believe that one cannot take this report out of the world context. The world context at the moment is one in which there are many very much more stable countries than our own that are doing precisely what we are doing. Here is a country like Holland, with a highly homogeneous population, yet it feels the need for this kind of legislation. Here is a country like Sweden, and other western European countries which do not have our multi-ethnic cleavages, with all the problems we have faced and will face, and yet they feel the need for this much protection for whoever may be maligned as a member of a group, be it religious or otherwise. So, I ask you to see this in some larger context, as well as within the Canadian tradition, within the British tradition, within the Franco-Canadian tradition, and all within the human rights tradition which post-1945, it seems to me, we now are sharing.

I would like now to turn to the technical attacks on the legislation *per se*.

It seems to me the first thing I must say about the technical attacks on the bill is the position in which the committee found itself. I wish to place on record facts perhaps not revealed to you by me last time because they did not come up in the same way they are coming up now.

The Committee had before it the problem of saying precisely what Senator Choquette asked me last time—I thought with some perception—namely: Does the criminal law cover this kind of problem or not? And the committee had before it the fact that a good deal of homework had been done, and we did not at first know ourselves whether or not we would be in a position of really doing a profound study of the existing criminal law or of doing something less, but we went probably further than most people expected.

Let me tell you the background. We had before us two major opinions by two counsel whom the Canadian Jewish Congress had asked for opinions in '64 and '65. The question they put to Arthur Martin and Arthur Maloney, both of the Ontario Bar, each separately, was: Is hate propaganda presently to be caught under the existing provisions of the Criminal Code? The Congress were told—and they gave us and the Department of Justice

copies of the opinions: No, the present Criminal Code does not cover the kind of problems that the hate propaganda issue raises.

So, here were two of the most experienced criminal law counsel of the Ontario Bar—and, certainly, in Arthur Martin, perhaps one of the great counsel of his day—giving their formal opinion, after looking at the Canadian Criminal Code, saying they just did not think the issues were caught by the Criminal Code as we have it today.

Secondly, sir, we had a report of a committee of the Canadian Jewish Congress itself—and I do not wish to overstate the role of the Congress in this, they simply did more homework than anybody else—and that committee had on it some very distinguished people. I have been permitted to say at this time that the then Professor Laskin, now Mr. Justice Laskin, was a distinguished member of that committee, which did a couple of years' work and which had a very strong civil libertarian bias, so much so that leading members of that committee were members of the Civil Liberties Associations of Toronto. It came to the conclusion also that the Criminal Code of Canada simply did not catch the kind of problems presented here.

Then we had before us four official governmental sources of information. First, the Attorney General of Ontario informed us that in his opinion it was not possible to prosecute hate propaganda distribution, its use and production under the present legislation. Secondly, the then Assistant Deputy Attorney General of Quebec came before us and informed us of exactly the same thing, that they were unable to prosecute as the law now stood. Thirdly, we had the R.C.M.P. view that in dealing with this matter they were advised by their law officers that they could not in any way be sure of a successful prosecution whenever they discovered the distribution or production of hate propaganda. Finally, the federal Department of Justice informed us in the course of our proceedings that after examining the problem they advised the minister that the present law seemed inadequate to cover these matters.

Then, Senator Choquette, after receiving all that information—counsel's private opinions, committee work, the opinions of four government agencies—we then decided that that was not good enough, and that it would be better if we did our own homework as

well. So, we had a member of our committee, Professor Mark MacGuigan, as he then was and who is now a member of Parliament, and who I believe appeared before you a couple of weeks ago, do a study in some depth of the whole problem in English, American, Australian and Canadian law. That study is Appendix 1 of the report, and it forms the basis of Chapter 4 on the law of the problem.

If you read Professor MacGuigan's very detailed survey of the law—a survey which is as good a paper on the subject as any published in Canada, in my opinion; in fact, I think it is the best short source of the law of seditious libel and related offences—you will see that he advises his colleagues that the present Criminal Code is inadequate to catch a variety of activities.

He raises one possible doubt as to the Code, and that is with respect of section 153 dealing with scurrilous material in the mails. He pointed out that section 153, dealing with scurrilous material in the mail—and I am glad to have with me the Executive Assistant and the Secretary of the Committee, Mr. Harvey Yarosky, a member of the Montreal bar, in case I go wrong on the law. He is a former student of mine, and a distinguished young practitioner of the criminal law. So I have brought him along to correct me whenever I show my ignorance.

The one doubt that Professor MacGuigan had was this, that when you take section 153 and interpret it as Mr. Justice Dalton Wells interpreted it in the *Thunderbolt* post office hearings—he had to determine whether the denial of the mails to the producers of the *Thunderbolt* was or was not a proper thing for the Postmaster General to have done, and he was, therefore, compelled to interpret section 153. Professor MacGuigan was only concerned with the possibility, namely, that section 153 went perhaps too far as interpreted by Mr. Justice Wells, and that you might, in fact, get a degree of limitation on free speech by too harsh an interpretation of section 153—greater than the committee would like to see.

Therefore, you discover in our report that we say that if our particular proposals go through, section 153 should be amended to conform with our proposals because it may be too severe in its present form.

So, after Professor MacGuigan's study, after the reports from the Attorney General

of Ontario and the Assistant Deputy Attorney General of Quebec, counsel in Ontario, the Department of Justice, the R.C.M.P., one working committee of the Congress, plus the MacGuigan document, we came to the conclusion that technically the holes in the Criminal Code were wide enough to let hate propaganda through, and that as they could not be plugged up the Code in its present form is inadequate. We therefore decided that we were correct in going ahead to try to design a piece of legislation that did not in our opinion damage free speech, but which plugged up the holes in the area of hate propaganda.

This brings me to the next point, which is the present proposed bill before you and the defects, that many witnesses, whom you have heard, suggested that it contains. Let us look at the bill clause by clause. Mr. Chairman, I do not know how much time you want me to take.

The Chairman: Whatever time is necessary. It is only five o'clock.

Dean Cohen: Very good.

The Chairman: Am I right gentlemen? How much longer do you think you would require?

Dean Cohen: I will go quickly through the bill, but I would say that once I am through the bill I do not think there will be much more to say after that.

The Chairman: Thank you.

Dean Cohen: I apologize to honourable senators for taking so long, but the subject is difficult.

The Chairman: The subject is also so important.

Dean Cohen: Let us, Mr. Chairman and honourable senators, go through the bill. My first comment is that in a general way the bill follows the recommendations of the report verbatim, with some important exceptions. I ask those of you who have copies of the report to turn to pages 69 to 70 where the original draft bill of the committee is to be found. I will make some comments on what the Government did to the original draft bill, and I hope that perhaps we might together, in view also of the constructive remarks made by other witnesses, emerge with a better document, though basically the same. I want to deal first with section 267A, advocating or promoting genocide. As I said last year, that the actual definition of the offence

has led to a good deal of misunderstanding. Some of your witnesses seemed to suggest that we are talking about a piece of legislation, to stop genocide.

The Chairman: No.

Dean Cohen: That is not it at all. We are talking about a piece of legislation to stop the advocacy of genocide. That is all we are talking about. I was glad to observe that this afternoon this issue has not really been raised, although I have read other witnesses who have raised the issue. There surely cannot be any legitimate argument that suggesting that identifiable groups shall be wiped out is part of a democratic debating process. No one in his right mind will suggest that legitimate democratic debating is harmed by preventing people from advocating the extermination of a minority or other identifiable group. As I see it, the issue is narrowly the one we addressed ourselves to, no more and no less, namely: shall Canadian political dialogue include the right to be able to include, the right to be able to advocate the elimination of any particular identifiable group, however you define an identifiable group. We will come to that in a moment. I rest on that; it speaks for itself.

Now, we come to the problem of a definition of genocide and here you will see some material differences in clause 267A, subclause 2, in contrast to what we recommended. We recommended that the concept of genocide be confined in our definition of advocacy to identifiable group, not to the words "any group". The words "any group" are words which are to be found in the Convention. It is not found in our draft bill at the bottom of page 69. If you look at the bottom of page 69 of our report you will see that we say genocide means any of the following acts committed with intent to destroy in whole or in part any identifiable group. We are not talking about any group. That was a mistake in the drafting of the bill. They may have been bemused by the elegance of the language so they wanted to try some of their own and in my opinion, they went wrong. I want to see the words "any group" replaced by "identifiable group". I have no doubts about that. Now, we come down to the definition of "identifiable group". This is the place to look at it, since it appears throughout the bill in several places. The words "identifiable group" are to be found in subclause 5(5) of clause 267B. They should

have been made applicable to clause 267A as well. In other words, the words "identifiable group" in the bill, in our proposed draft, should apply to all the offences, not merely to the offences dealing with clause 267B but to genocide as well. Whereas here in the Government's bill they put the definition only on the parts dealing with incitement to hatred and to group defamation. This was a mistake in our opinion, both as to clarity and of actual meaning. Further than that, the phrase "identifiable group" under subclause 5(b) left out of the definition two quite important words. It left out the word "religion" and the word "nationality".

Mr. Hopkins: National.

Dean Cohen: It left out three things, religion, language and nationality. In our draft, if you look at identifiable group you will see on page 70, clause (c) at the top, that identifiable group means "any section of the public distinguished by religion, colour, race, language, ethnic or national origin."

The Chairman: The page again, please.

Dean Cohen: That is at the top of page 70 of the report.

Why did the department do it? I regret the absence of some departmental official to help us with the dialogue. It would have been interesting to discover what they had in mind. I personally do not know what they had in mind in leaving it out. Senator Choquette said a year ago, very properly, that if we are going to have this kind of bill the word "religion" should be back inside and I have no doubt that is correct. I am open to persuasion for reasons that have to do with life in Canada at the moment and about the relevance of the word "language". I am not sure that we need to have the word "language", for reasons that Senator Choquette and I discussed a year ago. It both solves problems and raises problems, there again, I am quite open-minded on the subject.

National origin is again another difficult problem. The Dominion Bureau of Statistics used to have a category for determination called national origins. I think if my memory serves me correctly, about four or five years ago they got rid of that so that the concept of national origins is a concept which we know only sociologically not legally. Do we know it juridically any more in Canada so as to really—does it perhaps create more problems

than it solves? In short, would the definition of identifiable group perhaps not be best served, Mr. Chairman, by confining it to the words "colour, religion, race or ethnic origin" and leaving out nationality and language as further criteria? I simply put that forward as my opinion. I think it will be stronger and more manageable, both from the juridical and the political point of view. "Religion, colour, race, ethnic origin"—leave them in—"language and nationality", take them out.

Senator Phillips (Rigaud): And moving "identifiable group" to section 267A.

Dean Cohen: Moving "identifiable group" to cover all three offences.

Mr. Hopkins: In this act.

Dean Cohen: Yes, in this act. I am glad Mr. Hopkins suggested that phrase. There is something further about section 267A. In this section it says that genocide includes any of the following acts committed with intent to destroy in whole or in part any group of persons. We understood "destroy in whole or in part any identifiable group." That should be back in there. "Any identifiable group" should be part of the definition of section 267A, clause (2). Then, get rid of those words, "any group" because they become "any identifiable group", and then we define "identifiable group", as we did before. But we reduce the illustrations of genocide to the exact ones we have, rather than the five clauses here.

What happened was this—and again I never spoke to the Department of Justice about this, so I do not know what their motivations were.

Originally, if you look at pages 69 and 70 of the report, you will see that we included, from the Genocide Treaty definition of genocide, we included only three of the clauses—killing members of such a group, deliberately inflicting on such a group conditions of life calculated to bring about its physical destruction, and deliberately imposing measures intended to prevent births within such a group.

Here they put in all five. Whoever said it this morning—I think perhaps it was Dr. Howse, when I was in the room, and with this I agree, that many of these definitions I find have a kind of central European overtone about them and not a Canadian connotation. I think they come from postwar central Euro-

pean feelings. Therefore, one could leave out items (d) and (e). I am prepared to leave out (d) and (e), that is, deliberately imposing measures intended to prevent births within the group—which it seems to me has really no doctrinal or administrative relevance to our life.

Senator Everett: It is not relevant here.

Dean Cohen: That is so. And then delete (e), forcibly transferring children of the group to another group, as that has no sense in the Canadian context at all.

Senator Everett: That is right.

Dean Cohen: The only one I am on the fence about is (b), causing serious bodily or mental harm to members of the group. In our bill, we had...

Senator Phillips (Rigaud): "Deliberately inflicting on such a group..."

Dean Cohen: Yes—deliberately inflicting on such a group conditions of life calculated to bring about its physical destruction. It seems to me that the (a) and (c) are perfectly all right, because they are what we suggested.

Senator Everett: Is there not a redundancy between (a) and (c) at all?

Dean Cohen: One deals with killing members of the group and the other deals with deliberately inflicting on the group conditions of life calculated to bring about its physical destruction. I suggest that if you look at it in hard boiled terms, what you say is perfectly true. I suspect that when the draftsmen of the genocide treaty were defining it, they had in mind deprivations by occupying powers in such a way as to kill off the minority, and therefore they put this in the treaty as part of the variety of ways in which genocide can take place.

Senator Everett: Certainly it is not a Canadian offence.

Dean Cohen: That is right.

Senator Everett: I just wondered about the definition.

Senator Prowse: One could step in before the actual killing took place.

Senator Everett: Item (c) could remain and (a) could go.

Dean Cohen: I think you would find probably that anyone advocating this definition at

all would at least want in the bare statement of killing. They would want just the bare statement to be there.

The Chairman: This is advocating killing; it is not killing.

Dean Cohen: Yes, that is right. We are only discussing the advocacy of it, after all.

Senator Everett: That is right.

Dean Cohen: We are discussing the advocacy and promotion, but we are mostly concerned with advocacy. I want to come to the relevancy of the word "promote" in contradistinction to the word "advocate".

Senator Lang: There would be very little debating in this committee, if the thought were borne in mind that we are not dealing with the act itself but with just the advocating of it.

Dean Cohen: I am glad you mentioned that, Senator Lang. It is only the advocacy we are talking about. Therefore, there is no need for this whole string of definitions. We could have just one or two of them.

Senator Phillips (Rigaud): What would you be left with after getting the identifiable group in this list of persons?

Dean Cohen: We would keep in subsection (a) and subsection (c); we would take out subsection (d) and subsection (e), and the only question that would remain would be, should we keep in subsection (b) at all, as being one of the illustrations of the kind of advocacy you would prevent.

The Chairman: I would cut it out because harm to members of the group might include a very slight harm.

Dean Cohen: No, it says serious bodily harm or mental harm. My note to myself suggests that we should do without this, if necessary. We could do it this way: if one is talking about a politically acceptable instrument in this room, then what causes the least sense of challenge to one's common feeling that this is a good bill or a bad bill? I would be entirely guided how experienced honourable senators feel about the detail here. I have no dogmatic feelings one way or the other. I do believe there is a good case for leaving in subsections (a) and (c).

Senator Everett: I feel that subsection (b) could well be left in because, if there is any reason for such an act at all, there is a sepa-

rate case to be made for causing serious bodily or mental harm to members of the group, and that is not covered by subsections (a) or (c).

Dean Cohen: You think it is worthwhile considering.

Senator Everett: I personally do. I think it should remain. If the concept is there at all, it may not go so far as killing or be as serious as killing, but it is still a very serious offence and one which the group should be protected against.

Senator Phillips (Rigaud): Mr. Chairman, I think the words "or mental" should be deleted. I have been impressed by the arguments presented by previous witnesses and by honourable senators in this committee to the effect that when we get into the sphere of causing mental harm we are getting pretty close to interfering with the fundamental problem of freedom of speech.

Senator Lang: We are getting into an area of very subjective judgment.

Senator Prowse: Yes, and you cannot get a subjective definition.

Senator Phillips (Rigaud): I think serious consideration should be given to deleting that phrase.

The Chairman: We will just delete "or mental", then, but we will leave in the word "bodily".

Senator Phillips (Rigaud): Exactly.

Senator Prowse: Did I understand you to suggest, Dean Cohen, that subsection (d) should be left out?

Dean Cohen: Yes, we should leave out subsection (d), which mentions deliberately imposing measures intended to prevent births within the group.

Senator Prowse: One of the types of things that come into this question of hate propaganda from time to time, so it seems to me, is the suggestion that you might solve a problem by sterilizing all of a particular group. I am wondering whether we go further than we should in taking that out.

Dean Cohen: I think that is a very trenchant comment, Senator Prowse.

Senator Prowse: This can upset people more than being killed.

Dean Cohen: There is a fair amount of this dreadful literature in circulation at the present time advocating sterilization. I came across a pamphlet about the Doukhobors which suggested that the way to solve the problem with the Doukhobors would be to sterilize them all.

Senator Lang: You are getting pretty close to bringing the moderate of the United Church of Canada into this. He advocated sterilization in certain cases according to this morning's paper.

Dean Cohen: This brings him into what problem?

Senator Lang: He is in favour of sterilization in certain cases.

Dean Cohen: Well, perhaps that is a different debate. What reason did he have in mind?

Senator Prowse: The mentally unfit.

Dean Cohen: But that is not a genocidal debate.

Senator Lang: But he advocated the sterilization of a group of people—people who cannot look after their children properly.

Senator Phillips (Rigaud): That might be a creative idea leading to a non-creative result.

Senator Prowse: We have in Alberta a sterilization act, I don't know if there is a better name for it, and because of this suggestion which I read about in the paper it seemed to me that the context of that recommendation and the context of this legislation are sufficiently separate that there is no danger of the two forms of the act being confused. I do not think this legislation we are contemplating would in any way effect that enactment.

Dean Cohen: Which involves therapeutic types of control.

Senator Prowse: Unless it were to apply clearly to an identifiable group and was intended for the purpose of ending the existence of that group.

Dean Cohen: I think it is wise at this stage to come back to Senator Lang's point because we are talking here about advocacy. If a pamphlet advocates the sterilization of an entire identifiable group, that ought not to be part of the democratic process. There is no justification for this. Not even the most persuasive would be able to persuade anyone in a viable democracy that there is a right to

argue, as a part of the democratic process, that an entire identifiable group should be sterilized.

Senator Prowse: As I understood it the suggestion was made that people who have children and who have demonstrated an incapacity to take care of them as individuals should then be compulsory sterilized because they could not look after the children and there are the implications, of course, that the children would not be much better.

Dean Cohen: Well, you have two defenses here. There is the one that you mention that it will not be confused with therapeutic controls. The second is the way you define an identifiable group. That is a very specific consideration. It has nothing to do with a man or a woman looking after their children.

Senator Lang: Provided that is included in Clause 267A.

Dean Cohen: Well, perhaps it should be. I presume this is a drafting error. It seems strange to me not to have it in there.

Senator Phillips (Rigaud): Does that dispose of 267A?

Dean Cohen: Subject to the views of the honourable senators who may want me to say more, I leave it to your judgment as to whether the phrases in (2), (a), (b), (c) and (d),—I have no case to make at all for (e) and I agree with Senator Phillips that no really useful purpose is served by the phrase "or mental harm" and that you get the same results without it. Subject to those views, I have nothing more to say about it.

The Chairman: May I put on the record, just for our convenience, the phrase that you find in the United Nations documents, Article II on "Genocide":

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group.

Dean Cohen: I should make a correction there, Mr. Chairman. What you are reading is the draft which the General Assembly adopted and which appears at page 289 of our report. That is the Convention adopted by the General Assembly on December 9, 1948, and you were reading Article II, the definition. But when the Convention was ultimately signed, you will find that Article II had five paragraphs of description, not just those four, and they are the ones listed here, and that is why you have the difference. The General Assembly resolution is there, and here is the actual treaty itself. I can give you the citation: It appears in "A Compilation of all the Human Rights Conventions," and the definitions you see in 267A are verbatim, the definitions in the Convention as eventually signed by the member states.

If I may come to the next problem here: there is a school of thought which raises the question as to whether or not you need both words "promote" and "advocate" in the definition of the offence of genocide under 267A (1). I have given this a certain amount of thought. I am not prepared to say that there are not good arguments both ways but, personally, I think once you decide that advocating genocide is no part of the democratic debate, no real purpose is served by it, but then I think it is simply good insurance for the purpose of making this stick to talk about its advocacy or promotion, because you might promote it in a kind of indirect way without advocating it.

So, it seems to me the lawyership which is involved in a good piece of draftsmanship should be able to deal with the open advocacy and quiet promotion of the extermination of a whole group, so you are dealing both with advocacy and promotion of a particular activity. I think the draftsmen were right to use both, and I would feel that no great disservice would be done to our freedoms by having both verbs there.

Senator Phillips (Rigaud): You might find the person really promoting and the guiltiest is behind the scenes and not advocating at all in the technical sense of the word "advocating".

Dean Cohen: Quite.

Senator Phillips (Rigaud): I think it would be very important to keep both words in.

The Chairman: Perhaps I should put on the record, for our convenience, also section 407, or part of it, of the Criminal Code:

Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel, procure or incite other persons to commit offences namely,

(a) every one who counsels, procures or incites another person to commit an indictable offence

... and so on.

Dean Cohen: Yes, I would assume ...

The Chairman: And I might include the first few lines of (b) as well, namely,

(b) every one who counsels, procures or incites another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

Dean Cohen: Thank you, Mr. Chairman.

Senator Choquette: Dean Cohen, I must go, but I would like to make a suggestion before I do. There is no doubt that there are a lot of changes to be made to this draft bill. We have heard from Mr. Scollin of the Department of Justice on the re-drafting and suggested changes. We have heard from Mr. MacGuigan, and now from yourself. What are we to do if this committee recommends this bill to the Senate. I am wondering what kind of re-drafting will be done, and I know that you will not have time to re-draft this bill or suggest changes for its re-drafting to us today. Perhaps you could give us your suggestions in writing after you leave here today. I think that that is absolutely necessary. After we have read the suggestions of Mr. Scollin, of Mr. MacGuigan, and then of yourself, I wonder what kind of a bill we will have after we have accepted or rejected some of them.

Dean Cohen: The problem, Senator Choquette, is that I am trying to be consistent with the report. I have no authority to speak for my colleagues. We are *functus officio*, so I am really here as a former chairman of the committee trying to explain what we did.

The Chairman: I think that is the intention. It is your own judgment.

Dean Cohen: I would be glad—if the chairman in his wisdom were to invite me—to take the transcript and convert it into a series of re-draftings and give it to the chairman for distribution to his colleagues.

The Chairman: That would be satisfactory. Perhaps you would do that as soon as you can?

Dean Cohen: Yes, I will do it as soon as I can, although I shall have to give priority to the marking of examination papers, if you do not mind.

I come now to other defects on which the legislation has been challenged, and I come to seizure under section 267c of the materials before trial.

Senator Phillips (Rigaud): Dean Cohen, do you have anything further to say about 267b?

Dean Cohen: Yes, I simply want to say that so far as I am concerned I am quite happy with the language of 267b(1), 267b(2), and 267b(3). In short, if I might just summarize, I do not see any need to change because, in the first place they are pretty well the same as in our report. The offence in 267b(1) is the offence of incitement to hatred likely to lead to violence. This, it seems to me, is very much the same as the British faced in section 6 of their 1965 bill when they discovered that their changes in 1935 were not good enough, when they discovered that the old law of seditious libel was not able to contain inter-group violence caused by the attempt to incite one group against another.

I do not know whether you wish me to speak to some of the criticisms. I had not intended to because I was going to give priority to some other matters. However, I will speak to what appears to be the main criticism of section 267b(1), which is that you are not merely penalizing a speaker, but the speaker may in fact be inciting to violence by saying things in a public place likely to lead to violence, and what happens when he is attacked by the audience which itself then proceeds to behave in some unexpected way? The answer is, of course, that everyone forgets that the audience, if it behaves violently, is caught by other rules of the Criminal Code. It is caught by assault, by riot, by unlawful assembly, by any other of the provisions that deal with recourse to physical violence.

The Chairman: Perhaps murder.

Dean Cohen: Perhaps murder. There is, therefore, no problem here that is novel. What is novel is that we are asking whether the democratic process is helped or hindered by allowing men to get up and say things that

cause a diminution in the respect of another group, that cause a diminution of their self-image, and that ultimately cause hatred as between one group and another. Is this necessarily part of the democratic process? We came to the conclusion that it was not. There are four hurdles to jump over, if anyone cares to look at it; a statement in a public place, inciting to hatred or contempt and likely to lead to a breach of the peace. It seemed to us that those hurdles were so formidable that the real criticism of the bill is not that it inhibits free speech but that it will be very difficult to get a conviction.

The Chairman: There is also the question of the identifiable group.

Dean Cohen: Yes.

Senator Phillips (Rigaud): May I put a question to you? You have declared yourself in favour of the bill as drafted, and I would like your reaction to some of the changes suggested before we move on to seizure of documents. At the top of page 2 it says:

any identifiable group where such incitement is likely to lead.

There has been considerable criticism of the phrase "is likely". The theory is that you cannot peer into the future, and who knows whether incitement is likely to lead or not? I have been thinking that we might replace the words "is likely" by "should in all likelihood lead", or "should reasonably lead".

The Chairman: That is better.

Senator Phillips (Rigaud): I am wondering whether you have some suggestion to overcome the objection to the phrase "is likely". That is point one.

The Chairman: Suppose we just insert "reasonably likely".

Senator Phillips (Rigaud): Yes, I was thinking of that, "reasonably likely".

Moving down, I will first give the headings. In subsection (2) we see:

Every one who, by communicating statements.

Senator Phillips (Rigaud): I would like to see the insertion of everyone who publicly communicates statements while fully promoting under section 2—just get that publicly saying in, which again contracts this whole conception.

Senator Prowse: Does not that get away from the distribution of literature and stuff coming to your door?

Dean Cohen: You want to qualify 2 by adding the public problem.

Senator Phillips (Rigaud): Publicly communicates statements. Then I would like you to consider the suggestion made about the insertion of a paragraph similar to article 246, subsection 3 of the Criminal Code. I want to identify some of the points that have been raised.

Dean Cohen: What was your third point?

Senator Phillips (Rigaud): Paragraph 5.

Dean Cohen: What about it?

Senator Phillips (Rigaud): The definition of public place. I for one, naturally as a lawyer and steeped in the principle, as are all people living in British countries on this whole question of the home being his castle and so forth amongst ourselves. Would it be desirable to specifically insert that a public place does not include the private home of a person? This is a mere group of suggestions so we can be guided in due course.

Dean Cohen: I take it that what you are doing, Senator Phillips, is to really summarize some of the criticisms that have taken place around the table and you would like my views on it.

Senator Phillips (Rigaud): Yes.

Dean Cohen: I would answer first the phrase, "likely to lead" is sufficiently clear or sufficiently ambiguous, depending upon your legal training, for the purpose for which it is designed. I will give you illustrations of the problems. The Combines and Investigations Act, which is sophisticated legislation, has exactly that kind of language, "likely to cause detriment to the public". They have matched it with the phrase undue in the other sections and if one asks the question, which you are really asking, sir, whether or not the phrase likely posed unusual problems of interpretation, my general reaction would be that it is not unusual. If you ask the more difficult question, does this state with precision what we want to catch, that is more difficult for me to answer. I do not know the answer. I have a feeling that the addition of the word "reasonably" which is suggested here simply adds an

additional, interpretative burden to the courts, without giving you any new handlebar to deal with the issue.

Senator Phillips (Rigaud): Would you be good enough to note the problem with respect to that phrase.

Dean Cohen: Yes. On the question of clause 2, sir, this deals with what is perhaps in some respects the most likely to be controversial and has been the most controversial of the sections, because we are accustomed in our law to the idea of defamation as attached to the individual. We are talking about group defamation. When you talk about group defamation, even though it is the idea of a group you seem to be opening a door to an area which in the eyes of some people seems to go farther than the community needs or than the situation would demand. Therefore, you are saying, if I read your mind, that a desirable way would be to add further that it must be a public area, not simply any place. The difficulties are practical, because we are not now talking about incitement of violence. We are talking about the production of anything which in fact leads to group hatred and it is that particular problem, whether it takes place in public or private. You actually may do most of your defaming in private. You write a letter to somebody defaming a third party. You do it in private. A very large part of the defamation takes place *ab initio*, under private circumstances, even though at some stage it moves to the public domain. It was that kind of thinking which made it impossible to put it purely in the public form.

Senator Phillips (Rigaud): Thank you. Do you see any value in 246(3)?

Senator Prowse: No, it is to use the defence of blasphemous libel, in ordinary language.

Dean Cohen: We never considered that and I must say it is a very interesting thought, Senator Prowse. It never came before us as an idea.

Senator Phillips (Rigaud): Would you consider it now?

Dean Cohen: Yes, in my purely private capacity. Now, it is 246(3), "as a further defence".

The Chairman: I have got it.

Dean Cohen: Very good. Now, down to paragraph 5, the definition of public place, Senator Phillips, what we did was simply

take the definition of "public place" from the Criminal Code. If you look at Section 130 of the Criminal Code, I think it is verbatim.

Nowhere in the definition in Section 130, Senator Phillips, is the word "private home" referred to.

Senator Phillips (Rigaud): In view of what some people, well meaning people, may view as the novel aspect of this legislation, one might well consider that we need not necessarily follow the definition of "public place" in the Criminal Code. I am only highlighting the subject matter rather than coming to the details. While we are at it, we might go to (c), which I did not raise. There is considerable objection, and I am inclined to support it, that the word "statement" do not include gestures.

Dean Cohen: With respect to the first, let me give some consideration to your proposal under (a), whether the specific exclusion of private homes should be stated. Now we come to (c)—we took (c) largely from the British legislation and also from one of the human rights conventions which had language about communicating defamatory and other statements. You do not like the word "signs"?

Senator Phillips (Rigaud): "Gestures".

The Chairman: Wait a minute, we have not left "public place" yet, I hope. This idea of excluding private houses means that this offence is relegated to private houses, and I can see some great difficulties there.

Dean Cohen: It was Senator Phillips' hope that we might consider under (5)(a) that after defining what a "public place" is, to make it doubly sure, we might put that a public place could never include a private home.

The Chairman: Then you are really relegating the offence to private houses.

Some hon. Senators: No, no.

The Chairman: That is where the offence must be carried out, in order to avoid presecution.

Dean Cohen: Oh, I see.

The Chairman: Someone has raised questions about offences of this kind being committed in a church. I do not see that any liberty should be given to churches to do this sort of thing. It is the last place in the world where it ought to happen.

Dean Cohen: I was inclined originally to think that because we had followed meticulously the wording of Section 130 of the Criminal Code we were wise to do so, because there is a large number of decisions on what those words mean. But I will take a second look at it.

The Chairman: Then we will leave it alone at the moment. We are going now to (b).

Dean Cohen: I have no problem there.

The Chairman: We are going to insert "religion".

Dean Cohen: Yes, leaving out "language" and "national".

The Chairman: Just inserting "religion", so that we can cover race, religion or ethnic origin. That would be satisfactory to you?

Dean Cohen: Yes.

The Chairman: We have got a number of other methods of communication, one of which is recording. There is also the telephone method of communication, of which we have had a very good illustration. But the point that I suggest to you is that we should have some wording covering recordings, electronic or otherwise, and communications by telephone whether they are recordings or not. My suggestion would be that we put into the bill the words "recorded, electronically or otherwise".

Dean Cohen: Excellent. That covers it precisely: "recorded, electronically or otherwise." That is good.

Now, dealing with rest of my memorandum, I have only two points to make, really, and then I will be through with my presentation.

Senator Lang: I am sorry to interrupt you, Dean Cohen, but you were at one point going to refer to the problem of seizure.

Dean Cohen: I am glad you mentioned that, senator. Personally, I dislike the unexpected way in which Section 267c provides for the matter of seizure before trial. On page 71 of our report we suggested that seizures take place only after conviction. We further suggested that all prosecutions be only with the consent of the Attorney General of the province.

So those are the two very useful safeguards that I would recommend. These would be

very substantial, built-in safeguards against possible abuses, and I would like to see these introduced in any new legislation.

The Chairman: Perhaps you would deal with that in your memorandum, Dean Cohen.

Dean Cohen: I will put that in my notes too. If I may just conclude my general observations, sir.

The third class of attack on the legislation is that it is no longer a great issue in Canada, that the amount of hate literature is dropping off, etc., etc. It seems to me that the real answer to that is to be found in the remarks I began with earlier today. Do you on principle think that a democratic society should tolerate hate propaganda of this kind, or not, and do you believe that there are, however small, a number of people who feel degraded and abused by it. It seems to me that counting the number of pieces of paper circulating or the number of people involved is not a serious issue. If there were any serious numbers in the past, there will be serious numbers again in the future. Moreover, the report is very frank, sir, and there is the RCMP view on this. The RCMP is not known for its radical prognostications. The RCMP said "We don't really care whether or not it looks as if it is a minor problem of non-crisis proportions; we think that the time is ripe to have some legislation to give us the instruments to act when crisis proportions arise." There is no use having a demand for legislation after the horse has left the barn. Therefore subject to all the safeguards we built into our report, the Attorney-General's permission, etc., the idea of having the legislation now, whatever the dimensions of the problem, seems to be sensible to the RCMP and seems to be sensible to us.

On the grounds of principle and on the grounds of the psychological vulnerability whatever the numbers, and on the grounds of preparations for a more dangerous psychological time it seems to us that the argument running to de minimis is not an argument I could take too seriously.

I wish to conclude, Mr. Chairman, by saying that I thank the Senate for the great interest it has shown in this which I consider to be a most important piece of legislation, not so much important per se, but important symbolically, I think the legislation must reflect an ongoing change in philosophy in our public life, or a new psychological insight

into the way people are hurt or not hurt as the case may be. I think we have never had absolute licence in our society and we never will. Even the hippies recognize that they have some kind of code within which life must be lived if life is to be tolerable in any group. We are a multi-ethnic society with two official language groups. We are trying to work out a new constitutional structure. In a society where we have a Bill of Rights, the idea that you can have hate propaganda consistent with a Bill of Rights seems to me to be utterly unachievable. I can hardly conceive of a Bill of Rights theory which at the same time tolerates hate propaganda of a kind which is to be found in the appendices to this report and elsewhere in material which we were unable to publish.

I conclude, sir, by taking the liberty to read a word or two from the report itself which may perhaps give a feeling for what we believed at the time. I think no harm can come if in fact I take the opportunity of suggesting that at the end of the chapter II on the theory of free speech we made a comment that is worth bringing to the attention of the Senate. I read from the last paragraph of page 9 of the report.

In summary, issues relating to freedom of expression are not all open to the simple solutions that would have been applied to them a hundred years ago. Those who urged a century ago that men should be allowed to express themselves with utter freedom even though the heavens fell did so with great confidence that they would not fall. That degree of confidence is not open to us today. We know that, as well as individual interests, there are social interests to be protected, and these are not always protected by unrestricted individual freedom. The triumphs of Fascism in Italy, and National Socialism in Germany through audaciously false propaganda have shown us how fragile tolerant liberal societies can be in certain circumstances. They have also shown us the large element of irrationality in human nature which makes people vulnerable to propaganda in times of stress and strain. Both experience and the changing circumstances of the age require us to look with great care at abuses of freedom of expression.

And now one more reading, from the preface, at the beginning of the volume itself, and

this is perhaps the best way to close this opportunity I have had to speak to you:

This report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.

And the final paragraph:

Hate is as old as man and doubtless as durable. This Report explores what it is that a community can do to lessen some of man's intolerance and to proscribe its gross exploitation.

I thank members of the Senate Committee for their hearing.

The Chairman: Wonderful!

Senator Macdonald: Dean Cohen, in your opinion, if the proposed legislation had been in force in Germany, would such legislation have prevented what happened there during the Hitler regime?

Dean Cohen: That is a very complex and difficult question to answer. May I give you a totally inadequate answer?

It is my opinion that if the German social and legal traditions from the 1850s on had something approximating the totality of our democratic process and our legal institutions, you might have trained five or six generations of German elite, political leadership, labour, students and businessmen with social attitudes which may not have led to the degree of violence to which we became accustomed. Since Germany did not have that experience, and you add to that fact certain regional and cultural idiosyncrasies of its own, the result was the tragedies of World War I and World War II. So that it would be foolish of me to pretend that this legislation, by itself, could have prevented cataclysms

such as World War II. But it would be equally foolish to pretend it could not have been part of the greater political tradition. If it had occurred in the light of Anglo-Canadian social and political history, such legislation might have helped to change some parts of German political history.

Senator Phillips (Rigaud): I would like to support that by just one statement. I have just got through reading *The Life of Bismarck* by that great British historian Mr. A. J. P. Taylor, and in reading that one appreciates the foundations that were laid for intolerance and hate between the 1840s and the 1890s; and that foundation having been laid, I would like to say to my honourable colleague that legislation in the 1930s would not have been successful because of that.

Senator Lang: Certainly, under Weimar, Germany had some of the greatest intellectual flowering in its history.

Dean Cohen: It lasted barely eight or nine years. It was a tremendous experiment in German democracy from 1922 to 1929, and then it was over. It was a tragedy.

Senator Phillips (Rigaud): That was because it had no roots. It was in the air. The Weimar Republic had a similar life.

Senator Lang: What I gag on, Mr. Chairman—and I cannot help it—is the thought of having my country compared to Germany of the thirties. I believe in the innate goodness of man and not the innate evil of man which this bill pre-supposes and underlines. I cannot

in my conscience predicate a piece of criminal legislation upon that assumption of human nature.

Dean Cohen: Did I go that far, sir? I do not think so. I was referring to Dr. Kaufmann's appendix which is really worth reading again, because he summarized 25 years of literature in the field. He says that there are a lot of people susceptible to this kind of information. That is the point he makes. In short, I say that others are degraded, and the tragedy is that the degradee degrades himself.

You had Mr. Oliver here the other day, and he made an admission of significance to all of us when he said that the Negro community in Halifax is suffering and will suffer for a long time to come from their own inferior self-image which has been created by external pressures. In other words, they are often self-degrading because others have degraded them. That is the tragedy.

The Chairman: Honourable senators, it is time that we adjourn, but before doing so I want to thank you, Dean Cohen, for the very valuable information and guidance you have given us. We shall be pleased indeed to hear further from you as to what amendments you think should be made in the bill. In the meantime may we express appreciation for your public service in coming here in the course of your busy life to give what you can of your knowledge and wisdom for the benefit of the people of Canada.

The committee adjourned.



First Session—Twenty-eighth Parliament
1968-69

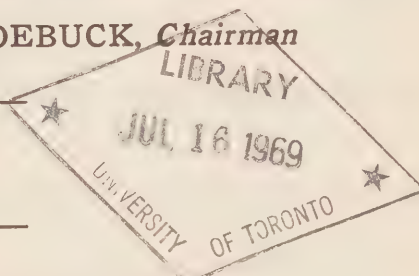
THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE
ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 12



Twelfth and Final Proceeding on Bill S-21,
intituled:

"An Act to amend the Criminal Code".

WEDNESDAY, JUNE 11, 1969

WITNESS:

Mr. D. H. Christie, Assistant Deputy Attorney General,
Dept. of Justice.

REPORT OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Gouin	Méthot
Aseltine	Grosart	Phillips (<i>Rigaud</i>)
Bélisle	Haig	Prowse
Choquette	Hayden	Roebuck
Connolly (<i>Ottawa</i> <i>West</i>)	Hollett	Smith
Cook	Lamontagne	Thompson
Croll	Lang	Urquhart
Eudes	Langlois	Walker
Everett	Macdonald (<i>Cape</i> <i>Breton</i>)	White
Fergusson	*Martin	Willis
*Flynn	McGrand	

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Wednesday, January 22nd, 1969:

“The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Leonard resumed the debate on the motion of the Honourable Senator Roebuck, seconded by the Honourable Senator Croll, for the second reading of the Bill S-21, intituled: “An Act to amend the Criminal Code”.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Leonard moved, seconded by the Honourable Senator Fergusson, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extracts from the Minutes of the Proceedings of the Senate, Thursday, February 13th, 1969:

“With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Foreign Affairs and the Standing Senate Committee on Legal and Constitutional Affairs have power to sit during adjournments of the Senate.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.”

“With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report to the Senate from time to time on any matter relating to legal and constitutional affairs generally, and on any matter assigned to the said Committee by the Rules of the Senate, and

That the said Committee be empowered to engage the services of such counsel and technical, clerical and other personnel as may be necessary

for the foregoing purposes, at such rates of remuneration and reimbursement as the Committee may determine, and to compensate witnesses by reimbursement of travelling and living expenses, in such amounts as the Committee may determine.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extracts from the Minutes of the Proceedings of the Senate, Tuesday, March 11th, 1969:

“With leave of the Senate,

The Honourable Senator Langlois moved, seconded by the Honourable Senator Martin, P.C.:

That the Standing Committee on Legal and Constitutional Affairs be empowered to sit while the Senate is sitting today.

The question being put on the motion, it was—
Resolved in the affirmative.”

Extract from the Minutes of the Proceedings of the Senate of Canada, Tuesday, 22nd April, 1969:

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators Giguère and McElman be removed from the list of Senators serving on the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

With leave of the Senate,

The Honourable Senator McDonald moved, seconded by the Honourable Senator Bourget, P.C.:

That the names of the Honourable Senators McGrand and Smith be added to the list of Senators serving on the Standing Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

WEDNESDAY, June 11, 1969.

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10.00 a.m.

Present: The Honourable Senators Roebuck, (Chairman), Argue, Aseltine, Belisle, Choquette, Connolly (*Ottawa West*), Cook, Croll, Eudes, Everett, Fergusson, Flynn, Grosart, Haig, Hollett, Lang, Macdonald (*Cape-Breton*), Martin, McGrand, Methot, Phillips (*Rigaud*), Prowse, Urquhart, Walker and White.

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Consideration of Bill S-21, "An Act to amend the Criminal Code", was resumed.

Mr. D. H. Christie, Assistant Deputy Attorney General, Dept. of Justice, was heard.

Following discussion and amendments, Hon. Senator Croll moved that the Bill be now reported, as amended.

The question being put on the motion, the Committee divided, as follows:

YEAS: 14 NAYS: 12

The motion was declared carried in the affirmative.

(For details of amendments see text following these Minutes.)

It was resolved to report the Bill with the following amendments:

1. *Page 1:* Strike out subsection (2) of proposed new section 267A and substitute therefor the following:

"(2) In this section "genocide" includes any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:

- (a) killing members of the group, or
- (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin."

2. *Page 2:* Strike out subsections (3) to (5), both inclusive, of proposed new section 267B and substitute therefor the following:

- "(3) No persons shall convicted of an offence under subsection (2)
- (a) for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject; or

(b) if he establishes

- (i) that the statements communicated were true, or
- (ii) that they were relevant to any subject of public interest, the discussion of which was for the public benefit, and that on reasonable grounds he believes them to be true.

(4) Where a person is convicted of an offence under section 267A or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction, may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(6) In this section,

- (a) "public place" includes any place to which the public have access as of right or by invitation, express or implied;
- (b) "identifiable group" has the same meaning as it has in section 267A; and
- (c) "statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations; and
- (d) "communicating" includes communicating by telephone, broadcasting or other audible or visible means."

3. *Page 4:* Strike out subsection (7) of proposed new section 267C and substitute therefor the following:

"(7) No proceeding under this section shall be instituted without the consent of the Attorney General."

In the French text:

4. *Page 1, line 26:* Strike out "prévenir" and substitute therefor "empêcher".
At 11.00 a.m. the Committee adjourned until 2.00 p.m. this day.

ATTEST:

John A. Hinds,
Assistant Chief,
Committees Branch.

REPORT OF THE COMMITTEE

WEDNESDAY, June 11th, 1969.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill S-21, intituled: "An Act to amend the Criminal Code", has in obedience to the order of reference of January 22nd, examined the said Bill and now reports the same with the following amendments:

1. *Page 1:* Strike out subsection (2) of proposed new section 267A and substitute therefor the following:

"(2) In this section "genocide" includes any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:

- (a) killing members of the group, or
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(b) if he establishes

- (i) that the statements communicated were true, or
- (ii) that they were relevant to any subject of public interest, the discussion of which was for the public benefit, and that on reasonable grounds he believes them to be true.

(4) Where a person is convicted of an offence under section 267A or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction, may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(6) In this section,

- (a) "public place" includes any place to which the public have access as of right or by invitation, express or implied;

- (b) "identifiable group" has the same meaning as it has in section 267A; and
- (c) "statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations; and
- (d) "communicating" includes communicating by telephone, broadcasting or other audible or visible means."

3. *Page 4*: Strike out subsection (7) of proposed new section 267c and substitute therefor the following:

"(7) No proceeding under this section shall be instituted without the consent of the Attorney General."

In the French text:

4. *Page 1, line 26*: Strike out "prévenir" and substitute therefor "empêcher".
All which is respectfully submitted.

A. W. ROEBUCK,
Chairman

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Wednesday, June 11, 1969.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, to amend the Criminal Code (Hate Propaganda), met this day at 10 a.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The *Chairman*: Honourable senators, you will remember that we left off considering this so-called "Hate bill" on the last page of the bill.

The section reads:

267C. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda, shall issue a warrant under his hand authorizing seizure of the copies.

It was proposed in amendment:

Where, on application made, with the consent of the Attorney General, the judge is satisfied . . .

You will recollect that that was voted against.

Following that, there was a discussion, because it was perfectly obvious that nobody on the committee wished to exclude the consent of the Attorney General. It was arranged that I should redraw the section and present it—as I am prepared to do now.

What I am suggesting now is that we carry that subsection (1) as it stands, without amendment; and then, when we come to subsection (7), which contains the statement that the Attorney General's consent is required, we strike that subsection (7) out and substitute the following:

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

Are you ready to consider that?

These sections are provisions for the seizure of hate materials, on the order of the judge. You will recollect

that, prior to this section there is another one, 267B, which says we have carried, which says:

(4) Where a person is convicted of an offence under section 267A or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction, may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited . . .

We have handled that. So the seizure of material is in two parts—one after a conviction, and otherwise without a conviction. The point is this: Let us presume that a storekeeper has some objectionable literature; he is charged and convicted, and the objectionable literature in his possession is ordered to be seized and forfeited. Then it turns out that the same literature, upon which a conviction has been registered, is found in another storekeeper's possession or another person's possession. The question is whether it is necessary to have a further conviction. It may be that that same material is to be found in various places all across Canada.

Is it the desire of the committee that a separate prosecution be instituted against everyone who is found with that in his possession? If you do rule that, it would mean that a very large expense would be placed upon the shoulders of the administration of justice. A long series of prosecutions of that kind would have that effect. Furthermore, it would be no favour to the person who, perhaps inadvertently, has that material in his possession.

So the section now before us provides that on proof before a judge that certain objectionable literature is to be found in a certain place, it may be sequestered by the Crown and, within seven days—I don't mean he has to wait seven days, but within that period and not longer than seven days, the owner shall have the notice that he may appear before the judge and give reasons why this particular literature shall not be seized.

If, in the hearing, it is found that it is hate literature of an objectionable character, then it may be forfeited to the Crown for disposition as the Attorney General may determine.

So, honourable senators, I have left section 267C (1) as it stood. That is, that, when proof is adduced before the court, literature of that kind may be taken into possession of the court.

The next section is that there shall be a summons to the owner to appear and show cause. So the owner may appear and, if he does show that it is not the kind of literature that is alleged, it is then returned to him.

If, on the other hand, it is found that it is hate literature, it may be forfeited to His Majesty to be disposed of as the Attorney General directs.

Then the next point is that it may be returned; then, finally, there is an appeal to the court of appeal against the decision of the judge.

Now, may I have a motion to pass these sections which seem to me to be all right?

Senator Cook: I so move.

The Chairman: Are you ready for the question? Is it passed?

Hon. Senators: Agreed.

The Chairman: All right, it is passed.

Now we come to subsection (7):

(7) Where an order has been made under this section by a court in a province with respect to one or more copies of a publication, no proceedings shall be instituted or continued in that province under section 267A or subsection (1) or (2) of section 267B with respect to those or other copies of the same publication without the consent of the Attorney General.

I am assuming that that will be struck out because it has already been dealt with under the particular sections we just carried. It is now mere repetition.

In its place I suggest that subsection (7) read as follows:

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

I do not suppose there is any objection to that. So I am striking out the repetition portion and substituting the simple statement that no proceeding under this section shall be instituted without the consent of the Attorney General. Are you satisfied with that? May I mark it carried?

Hon. Senators: Agreed.

The Chairman: All that is left in the first going-over of this material is the subsection dealing with definitions, which reads as follows:

(8) In this section,

(a) 'court' means a county or district court or, in the Province of Quebec

(i) the court of the sessions of the peace, or

(ii) where an application has been made to a judge of the provincial court for a warrant under subsection (1) that judge;

(b) 'genocide' has the same meaning as it has in section 267A;

(c) 'hate propaganda' means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under subsection (2) of section 267B; and

(d) 'judge' means a judge of a court or, in the Province of Quebec, a judge of the provincial court.

I don't suppose there is any objection to that. May I mark it carried?

Senator Haig: Mr. Chairman, under subsection (8)(a) "court" means a county or district court or, in the province of Quebec, the court of the sessions of the peace. But under subsection (8)(d) "judge" means a judge of a court or, in the province of Quebec, a judge of the provincial court. What is the difference between the "provincial court" and the "court of the sessions of the peace"?

The Chairman: Mr. Christie of the Department of Justice is with us, but he indicates that he does not have an off-hand answer to that question. I would therefore ask Mr. Christie to telephone for the answer to that question, and, in the meantime, I will mark "hold" on this particular subsection. Is that satisfactory?

Senator Walker: I think so.

Senator Haig: All right.

The Chairman: There are certain matters left over with which I should deal at this time, and I would ask you to turn to section 267B. (1).

Senator Lang: I wonder if I might have a moment of the committee's time before we go into these two sections which are the heart of the bill.

The Chairman: We are only going into the suggestion which you made and gave to me in writing regarding the phraseology of section 267B (2). We have carried the other sections. And I have now to bring that before the committee as I promised I would.

Senator Lang: I do not believe we passed 267B (1) or (2).

The Chairman: Yes, we did, and we did it on your suggestion too, by the way. We have certain amendments you suggested with respect to it and on your suggestion it was understood that we were dealing with the entire section and we did so.

Senator Lang: That is not my recollection.

Senator Walker: According to my recollection, it was held over.

The Chairman: The only thing held over, in my memory, was the phraseology of section 267B (1).

Senator Lang: Well, then, Mr. Chairman, I might switch my ground and I would like to address the committee on a question of privilege. This goes to the root of my objection to the principle of this bill. In connection with this point I wish to say that only last week a piece of hate propaganda was sent to me, and I think that this example of hate propaganda, so-called, demonstrates far more clearly than any words of mine the fundamental and very real concern I feel about the principle behind this legislation. For that reason I would like to bring this piece of hate propaganda to the attention of the committee now.

I refer, Mr. Chairman, to a tear sheet from the *Toronto Daily Star* of Saturday, June 8, 1968, and when I have finished my remarks, honourable senators who may wish to do so may see the sheet for themselves. The heading on this sheet is "He says Christianity is a FRAUD", and, if I may read on, Mr. Chairman, it says:

Organized Christianity, says Hugh J. Schonfield, is a colossal fraud, a perversion of the Jewish sect it originally was, based on pious forgeries that re-wrote history and today make up a large part of the New Testament.

"When, in The Passover Plot, I showed that Jesus had never claimed deity, and that this had been ascribed to him later, that he had sought to avoid death on the cross on grounds made clear to him from his interpretation of the messianic prophecies, and that his bodily resurrection had failed to materialize, I found myself assailed by an outburst of deep-seated emotions," said Schonfield.

Honourable senators, I think that under any of the definitions that we have in this bill now before us this publication could be termed hate propaganda. I wish to make clear, honourable senators, that I would defend to my death the right of Mr. Schonfield to say what he has said, and that I would defend to my death the right of the newspaper to publish it and I am a deeply religious Christian individual. I think here we have a demonstration of the danger that lurks behind this legislation in the suppression of such expressions as this. May I read a little further, honourable sena-

tors, from the part that deals with who Dr. Schonfield is.

Although a Jew by birth, Schonfield admits to being "haunted" by Jesus since his early years in Glasgow University. He has majored in the scholarly study of Christian origins—the formative years of Christianity—and has written more than 30 books on this and related subjects, including one of the earliest on the Dead Sea Scrolls.

He received a doctor of sacred theology degree from a Christian university—St. John's in Madras, India—for his radically new translation of the New Testament which changed a number of important passages...

In his latest manifesto, *Those Incredible Christians*, Schonfield continues his self-appointed mission to "give Jesus back to the Jews in a way they can understand and accept" without thereby, as he sees it, wresting him away from the Christians.

He calls for nothing less than a startlingly new vision of what Christianity was and what it should be today, and of what Judaism should be. And Jesus is central to both these visions.

This man is obviously a man of high scholastic attainments, a man of vision and a man who could not be conceived of as the author of such a thing as hate propaganda. Yet, honourable senators, some people would read that and would say that this was prompting contempt of a religious group.

Senator Prowse: But, Mr. Chairman,...

Senator Lang: May I finish my point of privilege, please. I think that is all I have to add at this time, and I appreciate the opportunity of being able to bring this before the committee, because I think that in a real way this underscores the great danger inherent in this piece of legislation which would make possible the suppression of freedom of expression, albeit unintentionally, by some of our great minds.

Senator Prowse: Mr. Chairman, may I through you put a question to Senator Lang?

Mr. Chairman: Certainly.

Senator Prowse: In view of the amendment which is provided in subsection (3) which says:

(3) No person shall be convicted of an offence under subsection (2)

(a) for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject;

Does the honourable senator not feel that this would give a conclusive answer to any charge of this kind?

Senator Lang: I am aware of the amendment.

The Chairman: Perhaps, Senator Lang, you realize that this is one of the amendments which I suggested and which we carried. May I add one more point? That is that we also added that the consent of the Attorney General was required before a prosecution could be taken against the newspaper in question.

Senator Lang: I recognize that, Mr. Chairman, but that amendment applies only to subsection (2) and subsection (3); it does not apply to subsection (1).

The Chairman: Subsection (1) applies to where a person uses offensive language against an identifiable group, the likely result of which is to cause a riot, and there the legislation is directed against the rioting rather than against what is said.

Senator Lang: I submit with respect that if that is the case, it should be directed against the rioters and not the person making the statement. Mr. Schonfield might make that statement in a public place as a result of which people might riot.

The Chairman: That had better not.

Senator Lang: And this makes my point in answer to Senator Prowse. It may be that this amendment to the subclause would protect the person making such a statement under subsection (2). But I do not know what would be considered decent language. I do not think anybody can define what is decent language. What may be decent language to one person may be quite indecent to another. We are getting again into subjective areas and in doing so we are creating new offences against the Criminal Code. If any legislation of this nature is passed it carries with it, I think, tremendous dangers particularly when this uncertainty is placed in a criminal statute creating a new criminal offence.

Clarity and definition are essential elements, particularly in criminal law; and although it may, in some people's minds, cover the difficulty, I think it is far too undefined and indefinable.

The other thing is it confines the remarks to religious subjects; it gives protection to religious subjects. There may very well be other subjects, political subjects or non-religious subjects of any other nature, that would bear the same hallmark as this, but which are not covered in the amendment.

Senator Prowse: Section 246 of the Criminal Code presently provides:

BLASPHEMOUS LIBEL.

246. (1) Every one who publishes a blasphemous libel is guilty of an indictable offence

etcetera. Then subsection (3) states:

No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.

This has been the law of Canada since 1892, and presumably, has been defined and satisfactorily defined. When my friend says that there is no basis for this, that we are now introducing something new into the law, that is not so. We have brought into this particular section of the act a section which has been subject to definition for 70 years and, presumably, has worked satisfactorily.

The Chairman: Are there any decided cases, so far as you know?

Senator Prowse: The ones I have are article reviewing the authorities on the subject of blasphemous libel, 227 *Law Times Journal*, and also the article "Blasphemy in Irish Law," 23 *Mod. Law Review*, 151. These are quoted in the 1967 issue of *Martin's Annual Criminal Code*.

The Chairman: As far as you know, there has been one case?

Senator Prowse: I am not sure of the number of cases, but there have been cases where it has been defined. It has given the courts no problem for more than 70 years; and I suggest it will give them no problem now.

Senator Choquette: Is Senator Lang alleging the article is blasphemous? I understood it was an honest expression of his own opinion; I do not see where blasphemy comes in at all.

Senator Prowse: It gives a complete defence under the particular section before us at the present time.

The Chairman: Is there any motion?

Senator Grosart: Mr. Chairman, I am a member of the committee, and I wish to correct a statement made by Senator Prowse when he said the blasphemous libel section has never given the courts any trouble. I remember, and perhaps you do, a blasphemy case in Toronto, when this section gave the court a great deal of trouble; and, in fact, it has given the court and the Crown so much trouble it is hardly even invoked. I say two things about this comment that

is particular wording of section 267B has not given any trouble: (a) it is not a fact; and, (b) it is not relevant here.

The Chairman: The court is there to take care of troubles of this kind, so I have not very much sympathy as far as the courts are concerned.

Is there any motion before the committee? If not, we will pass on.

Senator Lang: I do not know where you are passing on from or to, Mr. Chairman.

The Chairman: To your suggestion for a remodeling of section 267B(2). That is what I have before me at the moment, beyond what you have said. We passed these amendments at the last sitting.

Senator Lang: If I might interject here, there is another matter concerning the section I would like to raise. I think it raises very serious concern about this section, and before we proceed further I believe the committee should become aware of it. Probably it has not been brought to your attention before, to my knowledge, but it is the effect of the Canadian statute known as the Bill of Rights. Under subsection (3), the onus is placed on the accused to prove that he is not guilty. Under section 2 of the Bill of Rights the following provision appears:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . .

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty . . .

I think, in intellectual honesty, if subsection (3) is to pass into Canadian law, it must have prefixed to it, notwithstanding the Canadian Bill of Rights”.

Senator Everett: Mr. Chairman, could I have the exact subsection that is now being considered?

The Chairman: Yes, it is subsection (3) of section 267B.

Senator Everett: Thank you.

Senator Prowse: And section 267B(3), which we are discussing, provides defences and, presumably, there is also available to anybody the defence of the Canadian Bill of Rights.

The Chairman: May I inform the committee just what we are talking about, because it is rather important. Section 267B. (3) says:

No person shall be convicted of an offence under subsection (2)

. . . that is the section in question . . .

(a) for expressing in good faith . . .

. . . and we have gone over that . . .

or

(b) if he establishes

(i) that the statements communicated were true,

. . . and it is that last part to which Senator Lang is now addressing himself.

Senator Lang: That is correct. It is the onus section.

The Chairman: Yes.

May I point this out to the committee—and you must pardon me for doing too much talking, perhaps—that in all libel laws, and in many others, when the Crown has presented its case and apparently the man is guilty of the charge laid against him, he may then bring a defence, and one of the defences in libel law, as we are providing now, is that the statements contained are true. It does not throw the onus upon him to prove himself innocent; what it does do, in this and many other places in the Code, is to put the obligation on him to meet the charge that he is guilty. That is his defence, and here we are giving that defence to a person who is charged under subsection (2), that the statements contained are true.

Senator Choquette: How could this be proved on his application? It is a personal opinion.

Senator Cook: It is that he reasonably thought it to be true.

Senator Prowse: May I make a point that I think is of great importance when we are considering this? When the onus is on the Crown to prove something, the Crown must prove it beyond a reasonable doubt. When the onus shifts, as it does at a number of points of the law in our Criminal Code, to the individual to explain his behaviour—which is all this is—then the onus on him, the weight of proof, is merely by reasonable probability. In other words, he has the advantage of merely showing that; that is all; he does not have to prove beyond a reasonable doubt. The onus on the accused is never as great as the onus on the Crown, and we have accepted this in a great number of situations.

The Chairman: In all situations, when the Crown has established a *prima facie* case the onus of defending himself against that case switches to the accused.

Senator Prowse: He has to produce evidence, and all he has to do is to produce enough evidence to upset the onus on the Crown of going beyond a reasonable doubt. This is always the burden under our law as it is interpreted by our courts. It merely means a person can make a completely irresponsible statement without being able to assure somebody that he has some basis for it. He does not have to prove it was true. All he has to do is to prove that it might reasonably be accepted by him as being true, and that is all.

Senator Hollett: He has to establish that the statement is true.

Senator Prowse: No.

Senator Urquhart: That he believed it to be true.

Senator Prowse: If he proves it is true it is finished. All he needs to do is to prove it may probably be true.

The Chairman: May I read the next subparagraph:

...that they were relevant to any subject of public interest...

that would be a complete answer to Senator Lang:

...that they were relevant to any subject of public interest, the discussion of which was for the public benefit, and that on reasonable grounds he believed them to be true.

Senator Urquhart: "... he believed".

Senator Lang: I am not talking about the law of evidence. I am drawing the attention of the committee to the provisions of section 2 of the Canadian Bill of Rights.

Senator Prowse: Which is an additional defence.

Senator Lang: No, it is not a defence. It says that no person charged with a criminal offence—it is not referring to civil liability; it is criminal—shall be deprived of the right to be presumed innocent until proved guilty. If any law does so provide, it must specifically state it shall operate notwithstanding the Canadian Bill of Rights.

Senator Prowse: Is the honourable senator suggesting that we put another amendment in here to say that this shall apply notwithstanding? Is that his suggestion? Does he want to make that amendment to this bill?

Senator Walker: He is suggesting that this is the law in view of the Canadian Bill of Rights, and there is no question about it. You cannot pass legislation where the onus is on the accused. The onus is always on the Crown.

Senator Prowse: It is perhaps too bad that the honourable senator did not accept a judicial appointment, then he could lay down the law.

Senator Choquette: Come on! You have done enough of that in this committee.

Senator Prowse: As he did not accept such an appointment—

Senator Walker: You are the lackey for the group; understand that. Now let us get on with this. This is the Bill of Rights, and under the Bill of Rights this is obviously *ultra vires*; there is no question about that.

The Chairman: In that case, perhaps practically the entire Criminal Code is *ultra vires*.

Senator Walker: The onus is always on the Crown throughout the Criminal Code.

The Chairman: This type of legislation runs all through the bill.

Senator Walker: This type of legislation is the exception to it.

The Chairman: We voted on this on the last occasion and carried these amendments. In the explanatory letter I sent to each member of the committee individually, I omitted this:

No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

That was carried as well, and nobody, of course, has any objection to that. By accident I omitted that from the letter I sent, but it is in the text we carried. Is there a motion?

Senator Walker: I move that the bill be not reported.

The Chairman: We have not got to that yet. We are talking about the details. In due season I will ask whether I should report the bill. We are not at the time to do that yet, surely.

Senator Walker: What are we waiting for.

The Chairman: We are waiting to clear up some of these points that have been raised.

Senator Prowse: We are dealing with the section, and I move that the section be adopted as amended.

Senator Everett: Before any motion is put, I should like to clear my mind on Senator Lang's point. It would seem to me that one has to look at subsection (2), which is not in conflict with the Canadian Bill of Rights. Indeed, if the Crown makes a charge the onus

on the Crown to prove that the accused has wilfully promoted hate or contempt etcetera, and that the accused, in the terms of the Canadian Bill of Rights, is innocent until the Crown proves that charge, the onus being heavily on the Crown to prove the charge. If it does prove the charge, then the defence under subsection (3) is available to the accused, but you do not go to the defence, look at it and say, "Is the onus on the accused?" You go to the charge itself, and the charge is contained in subsection (2). The onus is on the Crown to prove that charge, and by virtue of that I cannot see where subsection (2) is, in all honesty, in conflict with the Canadian Bill of Rights.

The Chairman: If the Crown fails to prove a prima facie case against the accused, what happens?

Senator Prowse: It is dismissed.

The Chairman: The case is dismissed.

Senator Everett: The charge is dismissed, and therefore the accused is innocent until the Crown proves that charge.

Senator Prowse: These onus sections have been interpreted time and time again by our courts. The only onus that shifts to the individual is the onus of adducing evidence, and the interpretation has always been that all he has to do is to produce a doubt. For example, in a theft case where the goods are recently found, all the accused has to do is to give an explanation which may reasonably be true; he does not have to prove it. You do not have to prove the truth. If you provide evidence that what you have said is true, that is the end of the case. There is a second point, and that is that all you have to do is show that you reasonably believe it can be true. How far do you go beyond that to provide people with a reasonable definition?

The Chairman: I have given a great deal of latitude with the discussion of this matter. Unless I have a motion before the house I shall rule the discussion out of order and go on to something else. Is there a motion before the committee? I will proceed with what I have started on.

Senator Lang may recollect that he was discussing the phraseology of subsection (2), and I asked him to give it to me in writing which he did. I have that writing before me at the present moment, and I feel obligated to bring it before the committee because we did hold over that feature. We did not hold over the rest of the discussion. Section 2 reads:

Every one who, by communicating statements, wilfully promotes hatred or contempt against any identifiable group is guilty of . . .

Senator Lang sent me a note in writing to this effect:

Every one who communicates statements in any public place . . .

Of course, public place has been handled in the previous subsection.

. . . are calculated to incite violence or promote disorder against . . .

It stopped here, but continuing the subsection it would read:

against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of . . .

The only difference between the two sections that I can see is—well, perhaps Senator Lang will tell us that himself. He says, "calculating to incite violence." We have already dealt with that in the previous section. Would you please carry on, Senator Lang?

Senator Lang: That wording, Mr. Chairman, is the wording in the proposed amendments to the Criminal Code made by Mr. Saul Hayes, Executive Vice President of the Canadian Jewish Congress in a brief submitted to the Minister of Justice in 1963. The amendments proposed are amendments to the sections of the Code as they now stand, and the effect of inserting these amendments in a bill, framed as the one before us, causes me serious concern. I should like to say that the amendments proposed as specific sections of the code as contained in the original submission of the Canadian Jewish Congress are imminently reasonable, sound and based on principles of justice in the Code as it now stands. I feel on second thought that to try and inject them into this bill with all the distasteful aspects in it may serve no good purpose. I should like to withdraw my proposed amendment.

The Chairman: Thank you. Senator Eudes raised some question as to the accuracy of the French translation, if you call it a translation. They have equal validity. He pointed out that in section 267A, subsection (2)(d), line 26 on page 1 of the French version, that the English word "prevent" which in French is "prévenir" should be deleted and that there should be substituted therefor the word "empêcher."

Senator Eudes: If you translate it into English it would mean to foresee.

The Chairman: I have consulted with Mr. Scollin of the Department of Justice, and it is perfectly all right to make the change that Senator Eudes has suggested. If Senator Eudes still wishes to make that change or thinks it is advisable he may move to that effect.

Senator Eudes: I so move, sir.

The Chairman: Very well. It is perfectly all right to carry the motion. I am speaking now to the English-

speaking members of the committee. The senator has made a good point and we should substitute "empêcher" for "prévenir."

Hon. Senators: Carried.

Senator Walker: On division.

The Chairman: Surely this is a matter of phraseology.

Senator Walker: Just so you do not forget it.

The Chairman: Order, please. The French version of Bill S-21 shall be amended by striking out the word "*prévenir*" in line 26 on page 1 and substituting therefor the word "*empêcher*". I understand that is carried. Senator Walker asks that section 267B, subsection (6)(d) be held over. He said that he wanted to read it so as to understand it. It reads thus:

"Communicating" includes communicating by telephone, broadcasting or by other audible or visible means.

The purpose of the clause was to make it perfectly clear that the telephone matter that was before us was handled, and that broadcasting was also included. Are you agreed so far as this clause is concerned?

Senator Grosart: Has consideration been given to the definition of broadcasting?

The Chairman: Yes; it is already defined in the Interpretation Act. It is very broad, because electronics and things of that type have been included.

Senator Croll: Mr. Chairman, I move the adoption...

Senator Grosart: I might point out that the definition is quite limited. It is not a broad definition.

The Chairman: Of course, we have other sections here, the one that was carried:

(6)(c) "statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.

That defines "statements". Then the word "communicating" went along with "statements". Now we are defining "communicating" as by telephone or broadcasting. I wrote this clause—not that I have any pride of authorship, but it has been approved by the Justice Department official and it makes perfectly clear that that hassle with regard to telephones, where the person hired a line of the telephone and used it for the dissemination of the most horrible material, is included. The definition of broadcasting, Senator Grosart

says, is narrow. Well, to the extent that it is useful, I would like to see it included.

Senator Croll: I move the adoption of the subsection.

The Chairman: Thank you. Are you ready for the motion? The motion is to define as follows:

(6)(d) "communicating" includes communicating by telephone, broadcasting or by other audible or visible means.

Senator Hollett: May I ask a question before you put the motion? If I get up in the Senate and make a statement that may be offensive under this act, what will happen?

The Chairman: The Senate and House of Commons Act completely protects you. You can say anything you please in the Senate.

Senator Hollett: What if the press reports it?

The Chairman: The press would also be protected if they made a fair report of your remarks.

Senator Hollett: "Public place" includes any place to which the public have access as of right or by invitation, express or implied.

Senator Prowse: The Senate and House of Commons Act overrules the general act.

The Chairman: One at a time, please, senators. Senator Hollett is asking me some questions with regard to the law on this point. He asks, if he makes such a statement which would be objectionable under this act, in the House, what would be the result. My answer is that he would be completely protected.

The second question was, would the press, in reporting his statement, be protected, and my answer is that the press would be completely protected, under the Senate and House of Commons Act, if the report were a fair one.

Senator Hollett: If it were a fair one?

The Chairman: If it were a proper report.

Senator Croll: If they reported it as you said it and did not add anything to it—no editorializing.

Senator Hollett: In other words, we can get up in the Senate, if we like, and say the kind of stuff which is forbidden under this bill, and get away with it?

The Chairman: Yes, you can.

Senator Hollett: I do not agree with that.

The Chairman: Parliament has relied on your responsibility as a member of the Senate or of the House of Commons to use proper discretion under those circumstances—and I am sure you would.

Senator Hollett: In other words, you can get up and libel an identifiable group in the Senate and get away with it?

The Chairman: That is right, you could do so.

Senator Hollett: I do not agree with that.

The Chairman: There is a motion before you, honourable senators. Is it carried?

Some Hon. Senators: Carried.

Carried.

The Chairman: Now, I want to run over, for assurance sake, what we have done. We carried the entire genocide section. We carried number 1, making statements in a public place. We carried number 2, with the exception of the section which we have just now carried. We carried the section where the seizure may be made after conviction. Now we have carried 267C, and Mr. Christie was to answer a question asked in connection with its definition. Mr. Christie, you have the floor.

Mr. D. H. Christie, Assistant Deputy Attorney General, Department of Justice: Mr. Chairman, I spoke to one of the draftsmen who worked on the bill and I am informed that the Court of the Sessions of the Peace in Quebec and the Provincial Court are two separate institutions. Provincial Court is a new name, really, for "Magistrate's Court." The judges of both of those courts are to have jurisdiction to issue warrants to seize hate propaganda.

Senator Walker: Thank you very much.

The Chairman: So the section is carried. Is the preamble carried?

Some Hon. Senators: Carried.

The Chairman: Does the title stand?

Some Hon. Senators: Carried.

The Chairman: Do I report the bill?

Some Hon. Senators: Agreed.

Some Hon. Senators: No.

The Chairman: Do you wish to vote on it?

Senator Lang: I move that the bill be not proceeded with.

The Chairman: The motion is to report the bill.

Senator Croll: I so move.

The Chairman: Senator Croll moves to report the bill.

An Hon. Senator: Who seconds it?

The Chairman: No seconder is needed in committee. Those in favour of reporting the bill will please stand.

(Vote taken: 14 for; 12 against.)

The Chairman: I declare the motion carried.

Senator Croll: Mr. Chairman, would you consider standing the omnibus bill, Bill C-150, to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigations Act, the Customs Tariff and the National Defence Act, until this afternoon.

The Chairman: It is 11 o'clock. I am in the hands of the committee. Remember, gentlemen, we have but two weeks left. It is very important that we proceed with expedition.

I would like to use the hour that we have, unless the committee feels otherwise, and make the best use we can of it.

The early sections of this bill are very noncontroversial and I think we can move over them rapidly, until we get to the sections which are controversial. Shall we proceed?

Senator Urquhart: Why could we not postpone the sections that should come up for discussion and pass the noncontroversial ones without debate?

Senator Choquette: I doubt whether they will be debated, and I ask to be excused, and I see a lot of others about to leave.

An hon. Senator: Why not adjourn to two o'clock?

Senator Choquette: I will have nothing further to do with it. That is my attitude.

The Chairman: Senator Choquette, I did not quite understand you.

Senator Choquette: I said I will have nothing further to do with this type of bill. I am against it.

The Chairman: Well, that is all right. Shall we proceed or not?

Senator Urquhart: If there is no discussion on it or no objection, then let us report the bill. Let it be reported. We had a full debate in the house, why not report it now?

The Chairman: The Chair will accept a motion to report the bill.

Senator Cook: I so move.

Senator Urquhart: I second the motion.

Senator Macdonald: Mr. Chairman, although I am not a member of the committee, may I say that I heard someone suggesting that the committee be adjourned now until after lunch, at which time a study of the omnibus bill could be commenced. Personally, I think that would be a good proposal.

The Chairman: All right. We will adjourn until 2 o'clock.

The committee adjourned.



First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA

PROCEEDINGS

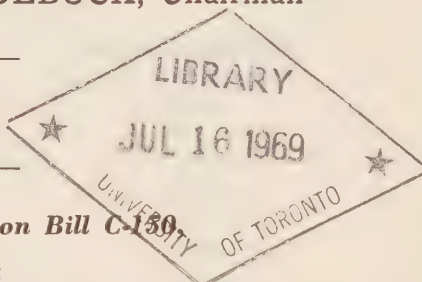
OF THE STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 13



Complete Proceedings on Bill C-130

intituled:

“An Act to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff and the National Defence Act.”

WEDNESDAY, JUNE 11, 1969

WITNESS:

Mr. D. H. Christie, Assistant Deputy Attorney General,
Dept. of Justice.

REPORT OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	Gouin	McGrand
Aseltine	Grosart	Méthot
Bélisle	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly (<i>Ottawa</i> <i>West</i>)	Hollett	Roebuck
Cook	Lamontagne	Smith
Croll	Lang	Thompson
Eudes	Langlois	Urquhart
Everett	Macdonald (<i>Cape</i> <i>Breton</i>)	Walker
Fergusson	*Martin	White
*Flynn		Willis

(Quorum 7)

*Ex officio member

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Tuesday, June 10, 1969:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Phillips (*Rigaud*), seconded by the Honourable Senator Hastings, for the Second reading of the Bill C-150, intituled: "An Act to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff and the National Defence Act".

After debate, and—

The question being put on the motion—

The Senate divided and the names being called they were taken down as follows:—

CONTENTS

The Honourable Senators

Aird,	Eudes,	Lefrançois,
Argue,	Everett,	Macnaughton,
Basha,	Fergusson,	Martin,
Beaubien,	Fournier	McDonald,
Benidickson,	(<i>de Lanaudière</i>),	McElman,
Boucher,	Gélinas,	McLean,
Bourget,	Giguère,	Michaud,
Bourque,	Hastings,	Nichol,
Cameron,	Hays,	Petten,
Carter,	Inman,	Phillips
Connolly	Irvine,	(<i>Rigaud</i>),
(<i>Ottawa West</i>),	Isnor,	Prowse,
Cook,	Kickham,	Robichaud,
Croll,	Kinley,	Roebuck,
Davey,	Kinnear,	Smith,
Denis,	Lamontagne,	Sparrow,
Desruisseaux,	Lang,	Thorvaldson,
Dessureault,	Langlois,	Urquhart—52.
Duggan,		

NON-CONTENTS

The Honourable Senators

Aseltine,	Grosart,	Phillips
Bélisle,	Haig,	(<i>Prince</i>),
Blois,	Hollett,	Quart,
Choquette,	Leonard,	Welch,
Flynn,	Macdonald	White,
Fournier	(<i>Cape Breton</i>),	Yuzyk—18.
(<i>Madawaska-</i>	Méthot,	
<i>Restigouche</i>),	Pearson,	

So it was resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Phillips (*Rigaud*) moved, seconded by the Honourable Senator Hastings, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

Wednesday, June 11, 1969.

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2.00 p.m.

Present: The Honourable Senators Roebuck (*Chairman*), Aseltine, Connolly (*Ottawa West*), Cook, Croll, Everett, Fergusson, Flynn, Langlois, Macdonald (*Cape Breton*), Martin, Phillips (*Rigaud*), Prowse, Smith and Urquhart.

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Bill C-150, "An Act to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff and the National Defence Act",

was read and considered clause by clause.

Mr. D. H. Christie, Assistant Deputy Attorney General, Dept. of Justice, was heard.

After debate, it was resolved to report the Bill without amendment.

On motion duly put, it was resolved to print 800 English and 300 French copies of the proceedings on the said Bill.

At 4.00 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

John A. Hinds,
*Assistant Chief,
Committees Branch.*

REPORT OF THE COMMITTEE

Wednesday, June 11th, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred the Bill C-150, intituled: "An Act to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff and National Defence Act", has in obedience to the order of reference of June 10th, 1969, examined the said Bill and now reports the same without amendment.

All which is respectfully submitted.

A. W. ROEBUCK,
Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS
EVIDENCE

Ottawa, Wednesday, June 11, 1969.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-150, to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigations Act, the Customs Tariff and the National Defence Act, met this day at 2 p.m.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 copies in French be printed.

The *Chairman*: Members of the committee, we are now ready to start consideration of Bill C-150. I suggest that we should not call any witnesses, but of course I am in the hands of the committee on that point. Many witnesses were heard when this bill was before the Commons Committee. Furthermore, we must keep in mind that we have only 16 days left before June 27 when we hope to rise, so it follows that we must be as expeditious as possible, and if we were to call witnesses we might be here all summer. Do I have the approval of the committee in that regard?

Hon. Senators: Agreed.

The *Chairman*: Let us then start with the bill itself. On page 1 is the short title. Then we come to part I, and from there to page 4 it deals with definitions. I suggest that we run through these quickly, and if they are satisfactory we can pass them in bulk. First of all there is the definition of "Attorney General" which is a standard one, and then there is the definition of "dwelling house". I presume that nobody has any objection to these definitions.

Then "Magistrate" is defined and "offensive weapon". Then we come to "Offences by public service employees" and there you will see—

"(1a) Every one who, while employed as an employee within the meaning of the *Public Service Employment Act* in a place outside Canada, commits an act or omission in that place that is an offence under the laws of that place and that, if committed in Canada, would be an offence punishable by indictment, shall be deemed to have committed that act or omission in Canada.

I presume that is satisfactory.

Senator Prowse: Does that cover Canadian Armed Forces abroad.

Mr. D. H. Christie, Assistant Deputy Attorney General, Department of Justice: No. They are governed by the National Defence Act which covers the question of extra territorial jurisdiction.

The *Chairman*: You will also note that this contains the words "within the meaning of the *Public Service Employment Act*".

Now, that covers the question of jurisdiction, and then we come to the clause which deals with cases previously tried outside Canada and it provides for the pleas of *autrefois acquit* or *autrefois convict* which would apply had the trial taken place in Canada.

Is there any objection to any of these or shall they carry?

Hon. Senators: Carried.

The *Chairman*: Will somebody move that?

Senator Phillips (Rigaud): I so move.

The *Chairman*: I do not think there is anything controversial in them.

The next clause is with respect to passports and is to be found on pages 4 and 5 of the Bill. You will notice in dealing with the forgery of or uttering of a forged passport it says—

"58. (1) Every one who, while in or out of Canada,

- (a) forges a passport, or
- (b) knowing that a passport is forged
 - (i) uses, deals with or acts upon it, or
 - (ii) causes or attempts to cause any person to use, deal with, or act upon it, as if the passport were genuine,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

I think that is clear enough. Are there any objections? I will mark it as passed.

The next is "False statement to procure passport". I do not think we need to go into the details there. That is satisfactory, is it?

Hon. Senators: Carried.

The Chairman: "Possession of forged, etc., passport":

Every one who without lawful excuse, the proof of which lies upon him, has in his possession a forged passport or a passport in respect of which an offence under subsection (2) has been committed is guilty of an indictable offence and is liable to imprisonment for five years.

That is clear, is it not?

Hon. Senators: Carried.

The Chairman:

(4) For the purposes of proceedings under this section

- (a) the place where a passport was forged is not material: and
- (b) paragraph (e) of section 268, section 309 and subsection (2) of section 310 are applicable *mutatis mutandis*.

Mr. Christie, will you tell us what that means?

Mr. Christie: Section 268 (e) provides a definition of "false document".

The Chairman: Just in a word, what is that?

Mr. Christie: It is more than a word, senator.

(e) "false document" means a document

(i) the whole or some material part of which purports to be made by or on behalf of a person

- (A) who did not make it or authorize it to be made, or
- (B) who did not in fact exist;

The Chairman: That is enough. Now:

... subsection (2) of section 310 are applicable *mutatis mutandis*

What are those sections?

Senator Prowse: The forgery sections.

Mr. Christie: Section 309.(3) provides that:

Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act upon it as genuine...

And section 310 provides the penalty:

(1) Every one who commits forgery is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) No person shall be convicted of an offence under this section upon the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

The Chairman: The standard procedure, of course.

Hon. Senators: Carried.

The Chairman: " 'Passport' defined":

In this section, "passport" means a document issued by or under the authority of the Secretary of State for External Affairs for the purpose of identifying the holder thereof.

That is clear?

Hon. Senators: Carried.

The Chairman: "Fraudulent use of certificate of citizenship":

Every one who, while in or out of Canada,

What does that mean? Do you mean it is fraudulent, no matter where he used it in Canada?

Mr. Christie: In or out of Canada. One of the problems arises at the U.S. border with Aliens trying to get into the United States and passing themselves off as Canadian citizens and producing a Canadian citizenship certificate as evidence of that.

The Chairman: Why is this sentence not completed?

"59. (1) Every one who, while in or out of Canada,"

That is as far as it goes.

Mr. Christie: If you refer to the Code, senator, it goes on to say in the Code, and this will be automatically picked up:

59. (1) Every one who
- (a) uses a certificate of citizenship or a certificate of naturalization for a fraudulent purpose, or
 - (b) being a person to whom a certificate of citizenship or a certificate of naturalization has been granted, knowingly parts with the possession of that certificate with intent that it should be used for a fraudulent purpose,
- is guilty of an indictable offence and is liable to imprisonment for two years.

Those words I have just read out automatically follow on.

Senator Prowse: You merely add to the act as it is now the words:

Every one who, while in or out of Canada,

Mr. Christie: Yes, because the offence I was talking about takes place on American soil.

The Chairman: Is that passed?

Hon. Senators: Carried.

The Chairman: That is that whole section of the bill. Shall I take it that is all satisfactory?

Hon. Senators: Agreed.

The Chairman: Now, the next is "Firearm" commencing on page 5, and this deals first with the definitions of "Commissioner" and "Firearm".

Senator Smith: Before we get too far into that part of the bill that deals with firearms, it would be helpful, to me at least, if Mr. Christie could tell us the changes this makes in the provisions contained in the law as it now stands with regard to the possession and use of firearms. Maybe we would not then have to read every little paragraph.

The Chairman: Mr. Christie has the floor.

Mr. Christie: As I explained to the senator this morning, this bill was made up in partnership, and the other half of the partnership was Mr. Scollin, the Director, Criminal Law Section, Department of Justice, who unfortunately is in Winnipeg today. We had anticipated that you would not be considering this bill until tomorrow. He is really the expert on this aspect of it, but I can give you the highlights of what these provisions do.

The most important of the new provisions are, first, that a superior court of criminal jurisdiction will now be empowered, on the application of the attorney general, to issue a warrant for the seizure of any firearms whatsoever, or ammunition belonging to or in the possession of a person. This new power is designed for the situation where it is considered desirable, in the interests of the safety of that person or other persons, that he should not have firearms or explosives in his possession.

The procedure, following the execution of the warrant, will be that the attorney general will then apply to the court for the sale or other disposition of the articles seized, and the court will hold a hearing and may order that the articles be sold or otherwise disposed of upon payment of compensation in an appropriate case. Provision is made for an appeal either by the person concerned or by the attorney general.

The second point is that in line with the desire to keep firearms out of the hands of persons mentally disturbed, the present bill makes it an offence for persons to sell or deliver firearms of any sort, or other offensive weapons, ammunition or explosives, to any one he knows or has reasonable grounds to believe is of unsound mind or is a person subject to a prohibitory order made by a court.

The third is that in view of the prevalence of hunting accidents and other accidental deaths arising through failure to exercise proper care with firearms, new provisions are added in the present bill making it an offence for a person to use, carry or possess a firearm or ammunition in a manner dangerous to other persons. This offence will be punishable, on indictment with a maximum of two years' imprisonment, or on summary conviction. We received representations from members of the judiciary that they just do not get convictions for criminal negligence, which carries life imprisonment where there is death involved, in hunting accidents. This is designed to get around that particular problem.

Finally, I might mention a new provision was introduced to enable the court, where it convicts a person of an offence involving firearms, to make an order prohibiting that person from having firearms for a period of up to five years after his release.

I think they are really the highlights.

Senator Everett: Mr. Chairman, in light of the fact that section 6 contains all the relevant provisions on firearms which Mr. Christie has explained to the committee, I would like to move that we adopt section 6, which would bring us up to page 24 of the amendments.

The Chairman: Page 23, is it not?

Senator Everett: Yes, the bottom of page 23, Mr. Chairman.

Senator Aseltine: This does not interfere with my carrying my shotgun when I go out shooting ducks?

Senator Croll: As long as you hit the ducks.

Senator Everett: Just make sure you hit the ducks.

The Chairman: I have been impressed with the danger of boys and irresponsible people around my farm. I had a goat one time tethered out in front of the house, and one day I came along and the goat was safe. There was a farmer who is informed on these matters who said that she would be all right there until morning, but in the morning she was dead. We turned her over and she had a bullet through her stomach, right in front of my house.

Senator Croll: They got your goat!

The Chairman: That was published in the newspapers all over Canada. It is all right to joke about it if it is a goat, but it might as well have been a child as a goat, and the police looked on it as being extremely serious. However, everybody was helpless in the matter. It might have been a stray bullet, or it might have been a purposeful killing of the goat.

Senator Urquhart: There are other provisions similar to that in the lands and forests acts in most provinces which prohibit the discharging of firearms within a certain distance of the highway, and so on.

The Chairman: My friend is right. This is covered up to page 23. If everybody is as favourable to this as I am we carry it.

Hon. Senators: Carried.

The Chairman: Then the whole section relating to firearms is approved by the committee.

We next go to section 7, dealing with sex deviation, commencing at the top of page 24. What shall we do?

Senator Croll: There is nothing we are going to do with it. We have done it. There is only one section dealing with it. I move that section.

Senator Urquhart: I second.

Senator Aseltine: That is the one clause I object to very strenuously. That is the one reason I voted against the whole bill, because that section was in there. There are a lot of good things in this bill, but I think this one is vicious.

The Chairman: Why do you think it is so vicious?

Senator Aseltine: If I had any support I would move that it be struck out.

Senator Croll: Not today I am afraid.

Senator Urquhart: Otherwise you agree with the bill.

The Chairman: I take it it is moved by you, Senator Aseltine, that it be struck out, but that apparently does not carry.

Senator Urquhart: Senator Aseltine can register his objection to it.

The Chairman: The objection is on record.

Senator Urquhart: Other than that he is in favour of the bill.

The Chairman: Does the section relating to sex deviation carry?

Hon. Senators: Carried.

The Chairman: Mr. Christie tells me that at the request of the Province of Quebec there is a technical amendment to section 8(1)(a), which says:

"court" means a county or district court or, in the Province of Quebec, the provincial court, the court of the sessions of the peace, the municipal court of Montreal and the municipal court of Quebec,"

Perhaps Mr. Christie would say something about it.

Mr. Christie: They are providing for a new institution in the Province of Quebec known as the provincial court, and we are giving that court jurisdiction. We are giving the municipal court of Montreal and the municipal court of Quebec jurisdiction over this aspect of the bill.

Senator Croll: Are you asking to make an amendment?

Mr. Christie: No, sir.

Senator Croll: Is this an explanation then?

The Chairman: It is only an explanation. Is the explanation satisfactory?

Hon. Senators: Yes.

The Chairman: Is that carried?

Hon. Senators: Carried.

The Chairman: Now we start with common gaming houses. Perhaps Mr. Christie would tell us what change is made from the present law by the amendment.

Mr. Christie: Shall I speak to gaming generally?

The Chairman: We will come to lotteries in a few minutes.

Mr. Christie: By section 9 we are doing away with the right of the bone fide social clubs to take a fee of ten cents an hour or fifty cents a day unless they have the approval of the Attorney General. It was represented to us by the Association of Chiefs of Police that where money can pass at all it can easily be used as a front for bigger poker games and so on, and the situation is almost impossible.

Senator Cook: What is wrong with having a game of poker?

Mr. Christie: Nothing, sir. This is proposed so that it will not be used as an illegal front. If there is a problem, the attorney general of each province will be able to specify the rules under which a house can take a fee. That is what it comes down to.

Senator Croll: We have been through it, Mr. Chairman. That goes from page 25 to page 34.

The Chairman: No, not this. We will come to lotteries in a few minutes.

Senator Croll: That is lotteries is it not?

The Chairman: No it is not quite. It is common gaming houses. Anyway, this is all right, is it?

Hon. Senators: Agreed.

The Chairman: That is carried.

Section 10, the warrant to search goes with it.

Now we turn to section 11, on page 27:

Sections 176 and 177 do not apply to

(a) any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to

(i) the winner of a lawful race, sport, game or exercise,

(ii) the owner of a horse engaged in a lawful race, or

(iii) the winner of any bets between not more than ten individuals;

Would you tell us about that, Mr. Christie?

Mr. Christie: The sponsor of this amendment is the Minister of Agriculture. Very briefly, what they are doing away with is a rather complicated formula in the present Code about who can take pari-mutuel bets on racetracks. This will simply provide that if a person is incorporated as a racing association and they can get a provincial licence, and so on, they will be able to carry on, and all this formula about having raced before 1912 and between 1912 and 1938 is being done away with.

The Chairman: It goes by the board.

Senator Prowse: Does this cover off-track betting?

Mr. Christie: No, it is unrelated to off-track betting. That is Bill C-197, which is presently before the standing committee.

Senator Everett: This also increases the take of the track.

Mr. Christie: I was about to mention that. The next thing is that at the moment the Receiver General can only take a half of one per cent to cover the cost of supervising on-course pari-mutuel betting. He will now be able to take up to one per cent.

The Chairman: Where do you get that?

Mr. Christie: That is subsection (3), on page 28.

Senator Phillips (Rigaud): Are there any consolation prizes for losers in the legislation?

Mr. Christie: No, I am afraid not!

The Chairman: Is that all satisfactory, gentlemen?

Senator Phillips (Rigaud): I move clause 11.

Mr. Christie: Senator Everett had raised a point that I think I should deal with. Under the present law the track can take nine per cent. You will see on page 29 a new formula. It is a rather complicated sliding scale formula, but it speaks for itself.

The Chairman: It is moved that we approve everything up to page 31.

Senator Phillips (Rigaud): All of page 31 until we get to clause 12.

Hon. Senators: Carried.

The Chairman: We are at clause 12, page 31, which says:

Paragraph (b) of subsection (8) of section 179 of the said Act is repealed.

We then come to clause 13 as follows:

The said Act is further amended by adding thereto, immediately after section 179 thereof, the following section:

Mr. Christie, perhaps you can help us there.

Mr. Christie: These are the new lottery provisions and under this scheme it will be lawful for the Government of Canada to manage and conduct a lottery scheme. It will also be lawful for a province or a group of provinces to conduct and manage lottery schemes and it will be possible under provincial licence to have lotteries at places such as LaRonde. As far as agricultural fairs are concerned they will be able to carry on any kind of a lottery, both on and off the fair grounds. At the moment they can only sell their tickets on the fair grounds.

Senator Croll: That is what you think, that they only sell them on the fair grounds. That is all right to make it law. Since it goes on you might as well make it lawful.

Senator Aseltine: Can we run an Irish Sweepstake under the laws of the bill? Can the province or dominion run a lottery such as the Irish Sweepstake for hospitals and other purposes?

Senator Prowse: This is legalized like in Montreal at the present time.

Mr. Christie: This would not affect the Montreal case unless the province set up the City of Montreal as its agent to run a provincial lottery scheme on its behalf. It would not affect the decision now pending in the Supreme Court.

The Chairman: I may say, that I detest lotteries, but when I was Attorney General I had to compromise all the time because good people, who were using the money appropriately and legitimately, were making it from bingos.

Senator Connolly (Ottawa West): Especially the Catholic Churches.

The Chairman: Especially so, yes.

Senator Connolly (Ottawa West): There is a story to the effect that a man was found in a no-man's land and they could not identify him. He picked out a lottery ticket from St. Joseph's Parish in Ottawa and they then were able to decide who he was.

The Chairman: Are you suggesting that we should all carry a lottery ticket in our pockets?

Senator Connolly (Ottawa West): Maybe it is a ticket to salvation; I do not know.

The Chairman: After all it is not a case of theory in these matters, it is how it works and whether it does great damage to the community. How far do we go?

Senator Everett: Mr. Chairman, I wonder if Mr. Christie could tell me the purpose of subclause (3) on page 33. He may have done so already and I did not hear it.

Mr. Christie: Yes, that is to cover the type of activity that goes on at amusement places like LaRonde, et cetera. They will now be able to carry on all of these lottery schemes under provincial licence.

Senator Everett: What is the situation today?

Mr. Christie: Today it is supposed to be done at an agricultural fair and things of that kind. The law is not obeyed very closely. We are trying to bring the law into line with reality.

Senator Prowse: This will take care of raffles and various types that are conducted.

Mr. Christie: It is more for the games of chance conducted at public places of amusement such as Crown and Anchor.

Senator Everett: I am sorry to waste the committee's time, but these shows that come to town have always bothered me because I think that many of them are not above board. When you are talking about the value of each prize being \$100, a game of Crown and Anchor can reach fairly substantial proportions based on that sort of inducement. The initial bet may be only 50 cents but I wonder if there is any protection in that section that I have not seen.

Mr. Christie: Yes, the real protection is that you have to be licensed by the provincial authorities. If they feel that you are running a dubious game they will not license you.

Senator Prowse: Presumably.

The Chairman: It is more than presumably. I can remember how I dealt with it myself in days gone by.

Senator Everett: Today they are putting it under the agricultural section, or squeezing it in there.

Mr. Christie: That is what most of these mobile outfits that you are talking about do. They go to so-called agricultural fairs and set up these midways.

Senator Everett: This, in effect, legalizes the fact.

Mr. Christie: Yes, because I am not satisfied that all of these things are genuine agricultural fairs. This will legalize the fact, but will also give the provincial authorities the power to license and through their licences control this sort of thing.

Senator Aseltine: What happens if the tickets are sold outside the province?

Mr. Christie: In a lottery scheme?

Senator Aseltine: Yes.

Mr. Christie: That is an offence. If Manitoba has a lottery scheme and Saskatchewan does not; if you sell tickets in Saskatchewan for the Manitoba scheme that is an offence.

Senator Prowse: Unless Saskatchewan approved.

Mr. Christie: If they get in on the scheme that is different.

Senator Prowse: In other words, it puts it clearly under the provincial Attorney General, that if he wants to stop it he can.

The Chairman: According to my experience it is pretty satisfactory. I can remember when they were setting up what seemed to be a little lottery here in Ottawa. We looked it over and it seemed inoffensive so we forgot about it. But in no time they hired two floors of a large building and started a lottery that covered all of Canada. I squashed it at once. Other Attorney Generals would act the same, I am sure.

Senator Aseltine: Is there anything contained in this bill to prevent betting on games of hockey, football, or other sports?

Mr. Christie: Between individuals?

Senator Aseltine: Between individuals or otherwise?

Mr. Christie: Yes. Section 178(1) of the Criminal Code, which is a very long and complicated one, deals with all types of gaming. They do have these exceptions, for example: 178 (1)

(a) . . . any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to

(i) the winner of a lawful race, sport, game or exercise,

(ii) the owner of a horse engaged in a lawful race, or

(iii) the winner of any bets between not more than ten individuals;

They also exempt a private bet between individuals not engaged in any way in the business of betting.

The Chairman: Is that all satisfactory?

Hon. Senators: Yes.

The Chairman: The chair will take a motion to carry it.

Hon. Senators: Carried.

The Chairman: That brings us to page 34. Now we come to the subject of abortion, which runs on to about page 42. What shall we do about that? We have an explanation from Mr. Christie.

Senator Connolly (Ottawa West): On these general sections, I wonder if I could ask a general question of the witness in connection with the point I raised last night on abortion, dealing with the conscience clause. Perhaps now that you have read the speech I made last night, you will know what I am talking about. The British had a conscience clause, they amended it in the House of Lords, but the one which was adopted finally by Parliament was not satisfactory.

In view of the fact that there are people other than Roman Catholics who have a conscientious objection to performing or participating in an abortion, and since abortion under circumstances here is permitted, to save the life of the mother or safeguard her health, I was very concerned about the criminal or civil responsibility of the doctors, hospitals, nurses or anyone associated, who for conscientious reasons refused to participate—particularly, I could add, in a case where, in these days, there might be an emergency and where their refusal to participate might imperil the life of the mother.

Mr. Christie: When we met with the Canadian Medical Association to discuss this proposed legislation, we were assured that therapeutic abortion is not an emergency type of therapy. We also heard from other medical sources that it is not an emergency type of therapy. Bearing that in mind and for these reasons, the minister has asked me to make expressly this statement, and these are his words: "The Government decided against the conscience clause".

As you probably know, when the bill was before the House of Commons at the report stage, there were at least a half a dozen conscience clauses considered and debated at some length.

Senator Connolly (Ottawa West): Eleven.

Mr. Christie: They were all grouped together. The minister's statement is:

The basic position is that a conscience clause was not included because it was considered redundant. The view taken is that there is nothing in Bill C-150 which in any compels an accredited or an approved hospital to establish a therapeutic abortion committee, nothing compelling a medical practitioner to perform a therapeutic abortion, and nothing which compels a woman to submit herself to that type of therapy.

That in a nutshell was the minister's position on that matter.

Senator Connolly (Ottawa West): You yourself are satisfied that there is no civil or criminal responsibility arising from the refusal of a person to participate?

Mr. Christie: I would be satisfied on that point. As far as the civil responsibility is concerned, it could be that a medical practitioner who has conscientious scruples about this sort of thing, and where a therapeutic abortion might be indicated, and he was not prepared to do it, there might be a legal obligation—we have not found any cases and this is theorizing—a legal obligation at least to advise his patient that he is not prepared to indulge in that type of therapy but that she may and that she can have another opinion.

Senator Connolly (Ottawa West): That may happen in any kind of therapy?

Mr. Christie: That is right.

Senator Connolly (Ottawa West): For the record, to make it complete, it seems to me—suppose another type of operation were being performed and it became necessary to operate, then from what I understand of the conscience problem, it seems that it does not arise in that case. Is that your understanding?

Mr. Christie: I would agree with that analysis. There the main thrust on what is being done is not to destroy the foetus but something else to which the abortion procedure, is ancillary and you get this result.

Senator Connolly (Ottawa West): Senator Ferguson last night mentioned a case where there might be an abortion involving a case of carcinoma of the breast, which might indicate that in order to have that operation succeed the child, or the foetus, should be taken away. I do not think that the conscience element comes into it in a situation like that. Would you agree?

Mr. Christie: I would agree basically with that. I cannot comment on the medical cases.

Senator Connolly (Ottawa West): Of course, we are all amateurs here. That was the only other aspect of the matter which occurred to me and I did not want to discuss it in the Senate so much, because Senator Fergusson had mentioned in her very excellent speech what I did not mention. I have heard in conversation about that other thing.

Senator Martin: On the other point, on what Senator Connolly said last night, you referred to the law in England. Is the fact that the child is treated differently in Canada, not due to the fact that the civil responsibility as well as the criminal responsibility is part of the capacity of the Government of the United Kingdom, whereas in Canada the jurisdiction is shared with the provinces?

Mr. Christie: Yes, there can be constitutional issues.

Senator Connolly (Ottawa West): You have also the other factor, that the social clause is in the bill and we have not got a social clause here.

It seems to me that what you are doing in this section, in view of the misapprehension or mistake or whatever it was when the statute was revised, is restoring the position existing prior to 1952, but you are doing it in a way that makes it unnecessary to go to the court. You are putting it into the act and saying that under these conditions an abortion can take place, whereas under the other system, if the abortion were performed and a charge laid, then the person charged would have to satisfy the court that he had done the right thing and there was conscientious objection to it.

Mr. Christie: Your suggestion is that we are putting the law back to where it was prior to 1954 . . .

Senator Connolly (Ottawa West): 1953.

Mr. Christie: In the 1953-54 statutes. Actually, this code came into force on April 1, 1955, I believe.

Senator Connolly (Ottawa West): I see. I was making a mistake last night, every time I mentioned '52, I think I was wrong. I thought it was in the Revised Statutes of 1952.

Mr. Christie: Article 752 of the Code, it says, shall come into force on the 1st of April, 1955. It is an argument that can be made. There have been no reported cases. I do not know of any case, reported or unreported, in Canada, involving a defence raised in relation to therapeutic abortion. To that extent there is uncertainty in the law. People do argue, as does Dr. Lederman, who is both lawyer and doctor, that under the present law there is absolutely no defence for therapeutic abortion. Others will come along and

say that really we are not changing anything. Still others will argue that, if a case were to come up under the present law under section 237, the courts would read in that word "unlawful".

So that to a large extent no one can say with certainty that "this" is the law and "this" is going to accomplish a particular result.

Senator Connolly (Ottawa West): That certainly satisfies me.

Senator Phillips (Rigaud): May I formally move clauses 14 and 15 on pages 34 and 35 of the bill?

The Chairman: Then, honourable senators, we are about to pass clause 14 and clause 15. Clause 14 reads as follows:

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

Clause 15 reads as follows:

209. (1) Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and is liable to imprisonment for life.

(2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child, causes the death of such child.

Is it agreed that clauses 14 and 15 are carried?

Hon. Senators: Agreed.

The Chairman: We will now turn to page 42, clause 18. Is there any need for discussion of this clause?

Hon. Senators: No.

Senator Aseltine: This clause deals with the matters that created the big debate in the house. These questions have been fully covered already.

The Chairman: Clause 18 reads as follows:

Section 237 of the said Act is amended by adding thereto the following subsections:

'(4) Subsections (1) and (2) do not apply to (a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for

the purpose of carrying out his intention to procure the miscarriage of a female person, or (b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(d) has caused a copy of such certificate to be given to the qualified medical practitioner.

Senator Aseltine: In what respect do these clauses contained on pages 42 to 44 change the law as it stands at the present time? Is anything added or anything taken away?

Mr. Christie: We cannot answer that in a definitive way.

Senator Aseltine: Why not?

Mr. Christie: Because you can get all sorts of answers as to what the law is, because the matter has never been tested in this country. There has been no case of therapeutic abortion raised in the courts. We have two to three cases in the U.K., but, unfortunately, as a result of the 1955 amendment there was a slight change in our section from the U.K. section which was the parent section, and it has just raised the debate all over again.

Senator Aseltine: I gathered from the screeches made in the Senate with respect to abortion, that there was a significant change here, a great change. Something terrible was being put into the statutes, apparently.

Mr. Christie: We get arguments ranging all the way from the suggestion that we are doing everything to the suggestion that we are doing nothing.

Senator Aseltine: Just what do these sections legalize in the way of abortion?

Mr. Christie: Under these sections, if they are passed, an abortion committee after studying a case, if it thinks it is a proper case for termination of pregnancy for reasons relating to life or health, can issue

a certificate and an operation can be performed. In those circumstances it will be a lawful operation.

Senator Urquhart: It has to be approved by a committee in an accredited hospital. Is that not the key to the whole thing?

Mr. Christie: In an accredited or an approved hospital, yes. And approved means approved by the provincial Minister of Health.

Senator Urquhart: That is the essence of the whole thing.

The Chairman: That is what happens now, but not legally, perhaps.

Mr. Christie: We have evidence that in some hospitals that is happening now, yes.

The Chairman: So the doctors, if this bill is passed, can perform the operations within the scope of this bill without fear?

Mr. Christie: That is correct.

The Chairman: And, in consequence, can continue to look after the girl after the operation takes place.

Mr. Christie: Certainly.

Senator Aseltine: That might work in the big cities, where you have the abortion committee and a whole lot of doctors and people to perform these services, but what are you going to do out in the outskirts 100 miles away from anything like that?

Mr. Christie: As I pointed out earlier, senator, we are assured that this is not an emergency type of therapy. It can be diagnosed and there will be plenty of time to get somebody to an approved or an accredited hospital where this can be done.

Senator Fergusson: Could something not happen, Mr. Christie, by way of a motor vehicle accident, for instance, as a result of which an emergency operation might be necessary?

Senator Croll: Certainly, in an automobile accident in which a pregnant woman is hurt very badly, it might be decided that, to prevent danger either to her life or her health, her pregnancy must be terminated. The doctor could do that on his judgment alone, there being an emergency factor there.

Senator Aseltine: This bill does not cover that situation.

Senator Croll: But it does. As Mr. Christie pointed out earlier, a doctor, in the course of doing something he started out to do to save her life, could terminate the pregnancy on his own judgment.

Mr. Christie: In the circumstances you have just outlined, in my opinion there would be no criminal liability because the termination of the pregnancy would be both necessary and incidental to the main treatment.

Senator Martin: In any event, that would come under section 209, wouldn't it?

Mr. Christie: That section has nothing to do with abortion.

Senator Martin: Of course not, but that is the argument. It would come under the reservation, and it has been so argued.

Mr. Christie: That is right, yes. It would be argued that way.

Senator Phillips (Rigaud): Mr. Chairman, I move clause 18.

The Chairman: Is it agreed that clause 18 carry?

Hon. Senators: Agreed.

The Chairman: Clause 18, then, which runs from page 42 to page 44, carries.

Now we come back to clause 16 dealing with impaired driving. That is to be found on page 35.

Senator Phillips (Rigaud): May I suggest that we deal with clause 16 and then clause 17 on page 41 which deals with impaired driving. Perhaps you might refer to them as the alcohol clauses.

May I ask Mr. Christie whether bottles of whiskey have been brought here to test on the senators to see whether the .08 figure is appropriate?

Mr. Christie: I do not think the Treasury Board would approve.

Senator Urquhart: How much liquor would one have to consume to arrive at that figure?

The Chairman: I will ask Mr. Christie to answer that.

Senator Prowse: I wonder if we could make this excerpt from the RCMP Report part of the record.

The Chairman: I think this should be answered by Mr. Christie and he can use that if he so wishes.

Mr. Christie: You cannot reduce this to an absolute mathematical certainty, senator. It varies with the size of the person. Doctor Coldwell now the director of the Centre of Forensic Sciences, Government of Ontario, reporting on the Grand Rapids Study listed findings as follows:

- Alcohol blood level of .04—(1-2 drinks)—Slight impairment
- Alcohol blood level of .06—(2-3 drinks)—risk twice that of none
- Alcohol blood level of .08—(3-4 drinks)—significant impairment

Senator Urquhart: That is in one-ounce drinks, I presume.

Mr. Christie: I presume they are.

Senator Prowse: 86 percent proof?

Senator Croll: Does it say anything about the time element or the element of eating in between? Surely if these were taken over a period of four or five hours, that would make a difference.

Mr. Christie: There would be an absorption factor in that situation. The longer the time lag the more the content factor is liable to decrease.

Senator Urquhart: It would also depend on the size of the drinks.

Senator Prowse: The RCMP did a series of investigations and they found that the blood-level content came out precisely having regard to the amount of alcohol ingested, the length of time and the weight of the individual. There was no variation. Now, they do not make any statement as to the degree of impairment, but the law we are asked to pass does not deal with impairment; it simply deals with the amount of alcohol in the blood. However, I think this statement should be made available to everybody who carries a driver's licence, and the Minister of Justice should take steps, through the provincial ministers or attorneys general, to see that this is done. Using this it is perfectly easy for anyone to do a simple mathematical calculation which would involve at most counting as far as 5 to ascertain the amount of alcohol in the system. It does not call for a judgment on driving ability which was one of the weaknesses in the old bill. It is purely a mathematical quantitative judgment which says "if you have 5 drinks, stay away from the wheel or you will be in trouble."

Mr. Christie: As I say, there is no certainty. Perhaps the following statement is a better one. This is from the Greater Winnipeg Safety Council Study and it says:

A 170-pound man drinking 5 1/2 ounces of 100-proof liquor, or 3 1/2 twelve ounce bottles of beer, within an hour would have a blood alcohol concentration of approximately 0.05 per cent. This same man, drinking 8 1/2 ounces of 100-proof liquor, or 6 1/2 bottles of beer, within the same time period would have a blood alcohol concentration of 0.10 per cent.

In other words he would be over the line.

Senator Aseltine: How do the new clauses 222, 223 and 224 change the existing law? What is specifically added?

Mr. Christie: Well, it comes down to this; we are doing away with the offence of drunken driving but the offence of impaired driving remains unchanged, and we are introducing this new element whereby if you drive of have care and control of a vehicle while the blood alcohol content is above the stated point you are in trouble.

Senator Aseltine: Then there will be no such thing as drunken driving if this is passed, only impaired driving.

Mr. Christie: Or the offence of having .08 alcohol in your blood, and that is an offence whether one is impaired or not. Even if you can demonstrate to the Court that with .08 blood alcohol content you are in better control of your faculties than at a lower level, you would still be convicted. It backs up this basic slogan "if you drink, don't drive." That is the message.

Senator Phillips (Rigaud): It also covers a refusal to take the breathalyzer test?

Mr. Christie: Yes, we have made breathalyzer tests compulsory to determine whether or not a driver has .08 blood alcohol content in his system.

Senator Prowse: The penalty for refusal is the same as if you had taken the test and failed.

The Chairman: In view of the number of deaths on the highways, almost anything that would help would be justified.

Shall clause 16 carry?

Hon. Senators: Carried.

The Chairman: That takes us on to page 36.

Senator Phillips (Rigaud): What about clause 17 dealing with impaired driving.

Mr. Christie: That is consequential.

The Chairman: So we are now carrying 17 and 18.

Clause 19, page 44, "Possession of instruments for breaking into coin-operated device":

Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for breaking into a coin-operated device is guilty of an indictable offence and is liable to imprisonment for two years.

Senator Croll: They are all the same sections dealing with that.

The Chairman: We do not need to spend too much time on that.

Hon. Senators: Carried.

The Chairman: Clause 20 will be the next, on page 46:

- 298.(1) Every one who
(a) steals
(i) any thing sent by post, after it is deposited at a post office and before it is delivered,

It seems to me, from reading this, that we have rather softened the law with regard to post office theft.

Mr. Christie: That is correct, senator. At the moment, if you are convicted of theft from the mails there is a minimum of six months' imprisonment, and we have found cases where post office employees, with no previous record of any kind, who have stolen relatively minor items from the mail, are prosecuted under the section and are sentenced to six months in jail. We think it is better to leave it to the court, and we are doing away with the minimum.

Senator Croll: You are perfectly right; there are some very harsh cases.

The Chairman: I have run into them too, terrible cases.

Hon. Senators: Carried.

The Chairman: That carries clause 21 with it, does it not; that is being repealed?

Mr. Christie: I should explain clause 21; it is rather significant. Section 306 deals with false advertising, and as a result of a representation by the Uniformity Commissioners two or three years ago, in 1967, it was decided that section should be transferred into the Combines Investigation Act and that it should be policed and enforced by that body.

The Chairman: That is all satisfactory?

Hon. Senators: Carried.

The Chairman: Now clause 22:

- (3) Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls . . .

Senator Croll: How does the bill collector fit into that?

Senator Smith: He has a lawful excuse.

Senator Phillips: I move that clause 22 be carried.

Hon. Senators: Carried.

The Chairman: Clause 23, "Failure to exercise reasonable care as evidence".

Hon. Senators: Carried.

Senator Prowse: There is a misprint in the subtitle, off to the side of subsection (4).

The Chairman: It sometimes gives enough to know what we are doing, but not always. "Presence a baiting as evidence"—that is cock fighting.

Senator Prowse: That subheading, beside subsection (4), on page 47, reads: "Presence a baiting as evidence".

Mr. Hopkins: I can correct that in the next printing of the bill. No amendment is required.

The Chairman: That is cock fighting.

Hon. Senators: Carried.

The Chairman: These sections with regard to the care of animals, are they satisfactory, gentlemen?

Hon. Senators: Carried.

The Chairman: We will go on to clause 24, "Certificate of examiner of counterfeit":

- (2) In any proceedings under this Part, a certificate signed by a person designated as an examiner of counterfeit by the Solicitor General of Canada, stating that any coin, paper money or bank note described therein is counterfeit money or that any coin, paper money or bank note described therein is genuine and is or is not, as the case may be, current in Canada or elsewhere, is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

Senator Croll: This will appeal to you, Mr. Chairman. You are always talking about the devaluation of the dollar. This will not affect it, do you think?

The Chairman: No, I am afraid not. Nor will it add any in your pocket!

Hon. Senators: Carried.

The Chairman: Clause 25.

Senator Croll: That is definitions.

The Chairman: This is merely a matter of jurisdiction.

Hon. Senators: Carried.

The Chairman: Clause 26, "Consent":

(2) No proceedings for an offence to which subsection (1) applies other than an offence for which the accused is punishable on summary conviction shall, where the accused is not a Canadian citizen, be instituted without the consent of the Attorney General of Canada.

Perhaps you might tell us something about that.

Mr. Christie: Under section 420(1), where an offence is committed by a person who is not a Canadian citizen, but in Canadian territorial waters, he can only be prosecuted with the prior approval of the Attorney General of Canada. There are ships on the west coast . . .

Senator Croll: It is the ships, is that it?

Mr. Christie: No, the individual, foreign seamen, and that sort of thing. On the west coast the problem is most acute. There are a great many Americans who come up into Canadian territorial waters and commit offences under the Small Vessels Regulations, and that sort of thing, and it is thought that prosecutions for those minor offences should not require the express approval of the Attorney General of Canada. So, we have exempted from that requirement any offence which is punishable on summary conviction.

Hon. Senators: Carried.

The Chairman: Clause 27, "Offence committed entirely in one province".

Mr. Christie: That is a consequential amendment.

The Chairman: This permits a court in one province to try an offence committed entirely in another province?

Mr. Christie: Clause 27(1) repeals subsection (1) of section 421 and substitutes a new subsection which would add section 5A (offences committed on aircraft, see clause 3 of Bill C-150 for amendment regarding offences by public service employees) and section 640 (transfer of probation order, see clause 75)—we have not come to that—and section 640A (failure to comply with probation order) to the exceptions in section 421.

The Chairman: Is clause 27 carried?

Hon. Senators: Carried.

The Chairman: There are exceptions to it. They seem to be quite lengthy. Will you tell me what they are?

Mr. Christie: Yes. Subsection (3) of Section 421 is amended to eliminate the requirement for the accused to be in custody before he can signify his consent to pleading guilty in one province to an offence committed in another province. He can do this at the moment, but he has to be in custody, and there are situations where the provincial people felt there is no need that he should be in jail in order that this procedure could be put into effect. That is what this does. There is a lot of wording, but 90 per cent of it is the old provision.

Hon. Senators: Carried.

The Chairman: Subsection (4), where accused committed to stand trial?

Mr. Christie: The new subsection (4) would have the effect of wiping out the fact that the accused may have already been committed to stand trial, or the fact that an indictment might already have been preferred against him in respect of the offence to which he desires to plead guilty. In other words, he might be in another province, and he might want to plead guilty, and this will allow him to do that, even though he has been committed for trial after preliminary hearing, and the indictment has been preferred.

The Chairman: That is carried, is it not?

Hon. Senators: Carried.

The Chairman: Clause 28, offence outstanding in same province.

Mr. Christie: This new section makes a change corresponding to those we have made in section 421. The accused does not have to be in custody before he can signify in writing his consent to plead guilty to an offence over which a court in another territorial jurisdiction in a province has jurisdiction. In

other words, he may have committed an offence in one territorial jurisdiction in Ontario, and be in another. This will allow him to plead guilty to that offence in the second place, again without being in custody.

The Chairman: That is a trifle, is it not? It is perfectly satisfactory. Is it carried?

Hon. Senators: Carried.

The Chairman: Clause 29, detention of things seized; The new subsection (1) of section 432 reads:

Where anything that has been seized under section 431 or under a warrant issued pursuant to section 429 is brought before a justice, he shall, unless the prosecutor otherwise agrees, detain it or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation . . .

This refers to the care of exhibits, does it not?

Mr. Christie: Yes.

The Chairman: Is clause 29 carried?

Hon. Senators: Carried.

Mr. Christie: I was just going to say that the point of that is that there is a three-months limitation now, and in some big investigations it has been found that that is not long enough, and we will be able to get special dispensation from the court if we can establish a case that something should be held for a longer period.

The Chairman: Clause 30, on page 52. This is a trifle, apparently. Can you throw some light on it?

Mr. Christie: Yes. For a summary conviction offence an officer can only arrest an accused if he finds him committing an offence, or he has in his possession a warrant for his arrest. This will allow him to arrest if he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction within which the person is found, whether or not he has actually the document with him.

Hon. Senators: Carried.

The Chairman: Now he has to take him before a justice, and so on, and it runs over to page 53, clause 32, election before justice in certain cases.

Senator Croll: These are all consequential amendments.

Hon. Senators: Carried.

Mr. Christie: These are all purely procedural.

The Chairman: Can we go on to clause 33, order restricting publication of evidence taken at preliminary inquiry. There is some substance to that, because many a person has been very restricted in the evidence which he might wish to give in a preliminary investigation by knowing that it may be published in the newspapers, and thus embarrass him greatly when it comes to his actual trial. So, his privilege of using evidence which might show him to be innocent is badly affected.

Senator Phillips (Rigaud): I think that this is a very useful amendment. We discussed it in the house. I move its adoption.

The Chairman: Yes, I approve of it highly, from what little experience I have had in it.

Hon. Senators: Carried.

The Chairman: We proceed to clause 34, warrant of committal.

Senator Croll: That is procedural.

The Chairman: It reads:

Where a justice commits an accused for trial he shall, unless he is a magistrate as defined in section 466 and the accused is admitted to bail under subsection (3) of section 463, issue a warrant . . .

Mr. Christie: That, again, is a purely procedural matter having to do with the form of committing a person to trial.

The Chairman: Is clause 34 carried?

Hon. Senators: Carried.

The Chairman: Clause 35, committal for trial at any stage of inquiry with consent. That is to say, while an investigation is proceeding, the accused can say: "I waive further proceedings and consent to the committal". Is that not it, Mr. Christie?

Mr. Christie: The point there is to clarify the law and make it clear that if an accused wishes, and the Crown consents, we do not have to have a preliminary inquiry.

The Chairman: And in the middle of an inquiry he can stop it and consent, can he not?

Mr. Christie: Yes, that is right.

The Chairman: Is that clause carried?

Hon. Senators: Carried.

The Chairman: Section 36 is really the change of name for the new provincial court.

Mr. Christie: We are getting a new institution called the provincial court.

Senator Phillips (Rigaud): Moved.

The Chairman: Is that carried?

Hon. Senators: Carried.

The Chairman: Under section 37, when the accused pleads for trial by a judge without jury, he must give written notice to the sheriff. Is that not all that means?

Mr. Christie: Yes.

The Chairman: He has always done that in the past but he has not been required to do so. Is that carried?

Hon. Senators: Carried.

Senator Urquhart: This is all procedure.

The Chairman: It is all procedure but we must go over it.

Senator Urquhart: There is no point of contention in any of this, is there?

Mr. Christie: No. These sections were not challenged anywhere.

Senator Urquhart: Why do we not move along then?

The Chairman: Move along to where?

Senator Urquhart: I think that page 67 would be the next break. Up to page 67 it is all procedure.

Senator Phillips (Rigaud): I think we should move formally to carry sections 38 to 47, which are procedural.

Mr. Christie: Section 46 might be worth looking at.

Senator Phillips (Rigaud): Then I formally move sections 38 to 45, which is up to page 62.

The Chairman: Do sections 38 to 45 inclusive carry?

Hon. Senators: Carried.

Senator Urquhart: Mr. Christie wanted to say something about section 46.

Mr. Christie: I think section 46 is more than bare procedure. This is a provision whereby in all cases the court may, without the necessity of leading any evidence, allow an accused person to plead guilty to included or other offences. About a year ago in the Ontario Court of Appeal there was a case called Dietrich in which they ran into some trouble. It was held a mistrial because Dietrich wanted to plead guilty and the judge accepted his plea without calling evidence; the Court of Appeal said that could not be done, and recommended to us at that time that we consider getting rid of that cumbersome procedure. That is what we are doing.

The Chairman: Does section 46 carry?

Hon. Senators: Carried.

Senator Phillips (Rigaud): Section 47 is a very humane one, for the assignment of counsel.

The Chairman: Yes. Where a man has not got counsel the court appoint one for him.

Senator Phillips (Rigaud): That is a wonderful provision. I move that.

The Chairman: Does that carry?

Hon. Senators: Carried.

The Chairman: Section 48 is the appointment of a board of review. What does that mean, Mr. Christie?

Mr. Christie: That is to insure that when people are incarcerated indefinitely because they have been found unfit to stand trial on account of insanity, or have been acquitted on the grounds of insanity, there will be a periodic review of their case so that they are not left there and forgotten for ever.

Senator Phillips (Rigaud): There have been abuses of that, and that provision is overdue. I move section 48.

The Chairman: Does section 48 carry?

Hon. Senators: Carried.

The Chairman: Section 49 deals with challenges by accused in the Territories. The accused has the usual challenge, I presume. What does this mean?

Mr. Christie: These are consequential amendments on the request of the Province of Alberta, who are now going to 12-men juries like the rest of Canada.

In the Northwest Territories and in the Yukon they are staying with six-men juries.

Senator Croll: Alberta had six-men juries and did not like it, it did not work out.

Mr. Christie: They thought they should get in line with the rest of Canada. When the six-men juries came in it was the old Northwest Territories and it was very sparsely populated. I think they feel there are enough people in Alberta now to have 12-men juries.

The Chairman: Does section 49 carry?

Hon. Senators: Carried.

The Chairman: Section 50 concerns the constitution of the jury, who shall be on the jury. I think that is all right is it not?

Hon. Senators: Carried.

The Chairman: Section 51 says that a trial may continue when a juror falls out. The trial can go on if the number of jurors is not reduced below ten.

Mr. Christie: Under the law as it is now, when a juror dies in the course of a trial the jury shall be deemed to remain properly constituted and the trial shall proceed, provided the prosecutor and the accused consent in writing, and the number of jurors is not reduced below ten, or in the Province of Alberta and the Territories below five. That is the present law. The purpose of the new subsection is to permit jury trials to proceed where one or two jurors become incapacitated.

Senator Croll: With or without consent?

Mr. Christie: Without consent. It is within the discretion of the trial judge. This recommendation again came from the judiciary. There have been cases that dragged on for several weeks, a juror has died and the accused, for tactical reasons, has decided not to consent so that the whole thing has aborted.

Senator Urquhart: Now it is up to the trial judge?

Mr. Christie: Yes.

The Chairman: Is section 51 carried?

Hon. Senators: Carried.

The Chairman: Section 52 says that subsection (4) of section 558 of the act is repealed. What does that mean?

Mr. Christie: Under the law as it exists now it is possible for the Crown, regardless of the circumstances, to insist on addressing the jury last, even though the defence has called no witnesses. That right is being eliminated and the rule will apply that if the accused calls no evidence then the Crown goes last.

The Chairman: That has been the practice for a long time.

Mr. Christie: It has been the practice, but this section in the code still gave the Crown an overriding right to go last if it wanted to. The section which deals with who can address the jury last is on page 209, section 558:

(4) Notwithstanding subsection (3) the Attorney General or counsel acting on his behalf is entitled to reply.

The Crown would not be able to go last now. It will depend on how the trial goes. It is a break for the defence.

The Chairman: As a defence counsel I thoroughly approve of it. Section 52 is carried. Section 53 "proof of previous conviction"—a certificate must be signed by the person who made the conviction, the clerk of the court in which the conviction was made and a fingerprint examiner. That is all there is to this.

Senator Phillips (Rigaud): That is procedural.

Hon. Senators: Carried.

Senator Phillips (Rigaud): Section 54, at the bottom of page 68.

Mr. Christie: It is consequential to some sections that come later. It relates to a right of appeal against sentence and this indicates what is included in a sentence.

The Chairman: Carried.

Senator Phillips (Rigaud): Mr. Chairman, the following clauses 55 to 65, inclusive, deal with the subject matter of appeals of convicted persons, including those declared unfit or with respect to verdicts of insanity. I think they are all clear and I move that sections 55 to 65, inclusive, be carried.

Hon. Senators: Carried and agreed.

The Chairman: Fifty-five to 65 are carried.

Senator Phillips (Rigaud): I feel that clause 66 is worth a few moments, Mr. Chairman. That is the

one in which we are protecting witnesses that should not be detained unduly beyond a certain period without protection. I think it is an important clause and I move it.

The Chairman: It is regarding the maximum period for the detention of witnesses.

Senator Croll: Thirty days.

Senator Urquhart: That is a good provision.

Senator Phillips (Rigaud): It is a very humane section.

The Chairman: It cannot be for a period of more than 30 days.

Senator Phillips (Rigaud): That is correct.

The Chairman: Unless prior to the expiry of the 30 days the witness has been brought before a judge of the Superior Court. Have there not been some provisions in the act that require a person arrested in the cities to be brought before the magistrate the very next morning?

Mr. Christie: The irony of this, senator, is that we are dealing here with material witnesses. These people are not charged with committing any offence, but they can be taken into custody and incarcerated indefinitely.

Senator Croll: There is one in the Montreal jail at the present time who has been there longer than Senator Phillips has been a senator, and they will not let him out.

Mr. Christie: He is out now, senator. As a matter of fact, it was his case which led to the amendment.

The Chairman: Very well, is clause 66 approved?

Hon. Senators: Carried.

Mr. Christie: We are just adding the words "or testify" to paragraph (c).

The Chairman: Is sixty-seven carried?

Hon. Senators: Carried.

The Chairman: Clause 68. Can you tell us what is being repealed in 68?

Mr. Christie: It deals with the recovery of fines imposed against corporations. Section 623, subsection (2) says:

Where a fine that is imposed under subsection (1) is not paid forthwith the prosecutor may, by filing the conviction, enter as a judgment the amount of the fine and costs, if any, in the superior court of the province in which the trial was held, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

We want that remedied to apply generally, not just to fines imposed under subsection (1) of clause 623, but to fines generally against corporations. You have an odd situation, because we may fine a corporation under the Income Tax law and have to go through some elaborate civil proceeding to collect the fine, because you cannot commit a corporation to jail.

The Chairman: Clause 69 carries out the new arrangements, "enforcement of fines on corporations"?

Mr. Christie: That is right. It will be the same formula only it will apply to all fines against corporations.

The Chairman: Is clause 68 carried?

Hon. Senators: Carried.

The Chairman: Clause 69?

Hon. Senators: Carried.

Senator Urquhart: Clause 70 is carried. This is a good one.

Mr. Christie: That is a hangover from 1959. We made a little mistake then when we were amending that section.

The Chairman: Clause 70 is carried?

Hon. Senators: Carried.

The Chairman: Clause 71, subsection (4) of section 626 of the said act is repealed. I suppose clause 72 takes its place?

Mr. Christie: Yes. This is done at the request of the Province of Ontario, in view of the fact that they have now pretty well taken over the full cost of administration of justice in the province. The present law provides, and this is applicable only to Ontario, that the proceeds of a fine, penalty, forfeiture or a recognizance belong by virtue of this section to Her Majesty in right of the Province of Ontario, but a municipality bears, in whole or in part, the expense of administering the law under which the fine, penalty or forfeiture was imposed or the recog-

nizance was forfeited, and the proceeds shall, notwithstanding anything in this section, be paid to that authority.

Ontario says that we have taken the cost away from the provinces. We are bearing it, and therefore we should receive this kind of revenue.

The Chairman: Taking the cost away from the provinces.

Senator Croll: The municipalities.

Mr. Christie: Therefore this revenue should flow into our coffers.

The Chairman: Does clause 71 carry?

Hon. Senators: Carried.

The Chairman: Clause 72, "moneys found on accused". What can you do with that now? Buy ice cream?

Senator Phillips (Rigaud): I move that clause, it speaks for itself.

Hon. Senators: Carried.

The Chairman: Clause 73.

Senator Phillips (Rigaud): The same. That is money from the accused. Tell me, what happens to it?

Mr. Christie: Section 628 presently permits the courts to order a person convicted of an indictable offence to pay an aggrieved person an amount by way of compensation for loss of, or damage to, property as a result of the commission of the offence. The aggrieved person must make application to the court, and an order is made at the time of the sentence. By the present subsection (3), the amount ordered to be paid may be taken out of moneys taken from the accused at the time of his arrest, except where there is a dispute as to ownership of or right of possession to those moneys by claimants other than the accused. By amending subsection (3) the court must be satisfied that ownership of, or right to the possession of, the money is not in dispute, and the court can direct such payments.

The Chairman: This deals with imprisonment for life, for more than two years.

Mr. Christie: The purpose of this amendment is to make it possible to send persons whose aggregate sentences are more than two years to a penitentiary rather than to a Provincial prison. The reason for this is that the penitentiary program is designed for

the purpose of persons serving longer sentences. Where a person is serving a sentence of more than two years and is incarcerated in a provincial institution, it is difficult for the provincial authorities, whose programs are designed for short term prisoners; and in the case of prisoners serving for more than two years it is disruptive to their system.

The Chairman: Is Clause 74 carried?

Hon. Senators: Carried.

The Chairman: Clause 75, suspended sentence and probation. Report of the probation officer.

Mr. Christie: In a nutshell, these provisions are to make it much easier for courts to place persons on probation.

Hon. Senators: Agreed.

The Chairman: Clause 75 is carried.

Senator Phillips (Rigaud): That brings us to page 87, I suggest, clause 76.

The Chairman: The definition of dangerous sexual offender. It means a person who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses. What happens to him?

Mr. Christie: Under the present law, the section goes on to say "or is likely to commit a further sexual offence". It was pointed out in the Klippert case, that went to the Supreme Court of Canada, that it would be possible to incarcerate a person indefinitely even if the further offence were just an act of homosexuality, without inflicting any pain or other evil of that kind and it was thought that was too harsh, so we are removing the possibility of that

Senator Phillips (Rigaud): I think that case went to the Supreme Court from Vancouver.

Mr. Christie: No, the Klippert case came from the Northwest Territories.

Senator Phillips (Rigaud): I move it be carried.

The Chairman: Clause 76 is carried. Clauses 77 and 78 are repeals. Clause 79 deals with the presence of the accused at the hearing of an application.

Mr. Christie: Under the present law it simply says that at the hearing of an application under this section the accused is entitled to be present. What we

are trying to do by this amendment is to say that he shall be present at the hearing, and provide for the means to get him there. It arose out of a couple of cases in Vancouver, where a person managed to get out before the criminal proceedings got under way. They chased him all over Canada and could not catch up to him. So an *ex parte* hearing was held to have him committed for an indefinite term. There was a bit of a ruckus over that. This will take care of that in the future.

The Chairman: It was a question of power to do that.

Senator Prowse: I do not follow that. The present section says he is entitled to be present. You are taking that out? That means he has to be present?

Mr. Christie: Shall be present.

Senator Prowse: So the rest of that is not in there, you have to get him there before you can proceed.

Mr. Christie: That is right, having regard to the gravity of the consequences.

Senator Prowse: Yes. I remember a case.

The Chairman: Clauses 77, 78 and 79 are carried.

Now we come to clause 80.

Senator Phillips (Rigaud): This deals with the question of preventive detention.

The Chairman: Clause 80 deals with disposition of appeal, preventive detention. The court may quash the sentence or dismiss the appeal. They ought to be able to do all that.

Senator Phillips (Rigaud): Clauses 80, 81, 82 and 83 are all part of the appeal procedure. They are clear and I move they be carried.

The Chairman: I am marking clause 80 as carried. We go to clause 81, detention on inquiry to determine legality of imprisonment.

Mr. Christie: This is an amendment from the present Section 681, which I will read to you, and if you follow the text you will see the change:

681. Where a person, being in custody by reason that he is charged with or has been convicted of an indictable offence, has instituted proceedings to which this Part applies, before a judge or court having jurisdiction, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or magistrate under

whose warrant he is in custody, or any other judge, justice or magistrate to take any proceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice.

The Chairman: That is the present law. Now, what does this do to that?

Mr. Christie: In the present legislation this section applies only to persons in custody charged with or convicted as indictable offenders. The amendment would extent the section to apply to persons charged with or convicted of a summary conviction offence.

The Chairman: Is it carried?

Hon. Senators: Carried.

The Chairman: Clause 82.

Senator Phillips (Rigaud): I suggest that we go to clauses 82 and 83, to the top of page 90.

The Chairman: Clauses 82 and 83 look to me to be all right and we should carry them. It is a matter of costs. There is nothing to that.

Clauses 82 and 83 are carried.

Hon. Senators: Agreed.

The Chairman: Clause 84.

Mr. Christie: Clause 84 is a slight amendment asked for by the Province of Quebec to describe the Court of Queen's Bench as (Crown side).

Hon. Senators: Agreed.

The Chairman: It is carried.

Clause 85 deals with the Province of Alberta and then the Province of Saskatchewan.

Mr. Christie: These are technical changes put in at their requests having to do with the setup of their district courts.

The Chairman: Do I hear the committee members say this is carried?

Hon. Senators: Carried.

The Chairman: Clause 86, notice of appeal. Really, gentlemen, we do not need to study that.

Mr. Christie: Clauses 86, 87 and 88 are put in to facilitate appeals by an accused for summary con-

viction offences. Among other things they do away with the requirement to deposit security for costs.

The Chairman: May I mark them carried?

Hon. Senators: Carried.

The Chairman: Clauses 86, 87 and 88 are carried.

Honourable senators, does clause 89 carry?

Hon. Senators: Carried.

Mr. Christie: It is only consequential on the others. In fact, I think you can go right through to clause 91 for the same reasons.

Senator Phillips (Rigaud): Mr. Chairman, I move clauses 90 and 91.

Mr. Christie: Under section 744 of the Code provision is made for fees and allowances for witnesses and interpreters, and so on, and the provinces have said they are responsible for the administration of the courts, and if they want to opt out, they should have a right to do so and to make different arrangements.

The Chairman: And by passing this we will be allowing them to do so.

Are 90 and 91 carried?

Hon. Senators: Agreed.

The Chairman: Perhaps you have to explain clause 92, Mr. Christie, in respect of these references to *prima facie* evidence.

Mr. Christie: They are getting away from the expression "*prima facie* evidence" and just using the word "evidence".

Senator Phillips (Rigaud): I move clause 92, Mr. Chairman.

Hon. Senators: Carried.

The Chairman: Clause 93 deals with nothing but forms.

Senator Phillips (Rigaud): I move clause 93, Mr. Chairman.

The Chairman: Does clause 93 carry?

Hon. Senators: Carried.

Mr. Christie: Now, Mr. Chairman, in clause 94, dealing with the Parole Act, you come to something outside my bailiwick.

Senator Croll: Mr. Chairman, Senator Phillips (Rigaud) is well briefed on the Parole Act and can explain anything that needs explanation.

Mr. Christie: And if there are any questions to which you want answers, I can simply telephone for the information.

Senator Phillips (Rigaud): In my speech in the Senate I said that basically speaking these parole provisions were to introduce more humane and fair treatment of people allowed out on parole. The provisions are less strict, but at the same time are protective for the body politic. It is a trend in the direction of more humane treatment of people on parole. Moreover, these provisions are not controversial at all.

Senator Urquhart: I move that Part II be adopted.

Senator Phillips (Rigaud): Part II consists of the clauses from clause 94 to clause 104 inclusive.

The Chairman: That takes up to page 113. Is it agreed that the clauses from clause 94 to clause 104 inclusive carry?

Hon. Senators: Agreed.

The Chairman: Now, Senator Phillips (Rigaud), will you tell us something about the Penitentiary Act on page 113, starting with clause 105.

Senator Cook: All it says is that a person cannot go to the penitentiary before the time of appeal has expired.

Senator Urquhart: That is the main change.

Senator Phillips (Rigaud): I might say, Mr. Chairman, that the Penitentiary Act is also part of this humane treatment that we are talking about and which is reflected in the provisions under the Parole Act.

The Chairman: If that is so, we can pass it.

Senator Urquhart: I move Part III, Mr. Chairman, consisting of clauses 105 to 108 inclusive.

The Chairman: Does Part III carry?

Hon. Senators: Agreed.

The Chairman: So clauses 105 to 108 carry.

We now come to Part IV, Prisons and Reformatories Act, clauses 109 to 115 inclusive. Does Part IV carry?

Hon. Senators: Carried.

The Chairman: Part IV carries. We now have Part V, the Combines Investigation Act.

Senator Phillips (Rigaud): The Combines Investigation Act on page 123 of the bill, Mr. Chairman, is the one to which Mr. Christie referred earlier today. I move clause 116.

Hon. Senators: Agreed.

The Chairman: Clause 116 carries. Do I understand Part V is carried?

Senator Phillips (Rigaud): Clause 117 deals with the Customs Tariff to bring it into line with the present law we are now proposing to pass and deals with the importation of firearms. It is purely consequential. I move that we carry clause 117.

Hon. Senators: Carried.

The Chairman: That was part VI and now we come to part VII which deals with the National Defence Act.

Senator Phillips (Rigaud): Mr. Christie, I am somewhat confused by this, perhaps you could clarify it for us.

Mr. Christie: Under the National Defence Act the military authorities can enforce provisions of the Criminal Code against service personnel. This is a provision whereby the Attorney General of Canada will be designating persons who will be designating persons as suitable as analysts for the military people. You see, in those circumstances, it would not be a provincial matter. The military have to enforce the provisions of the Criminal Code.

Senator Croll: I move clauses 118, 119 and 120.

Hon. Senators: Carried.

Senator Smith: Mr. Chairman, may I ask a question in relation to the last paragraph in clause 120. When might we normally expect this act to be proclaimed? What steps have to be taken, for example, to inform the legal fraternity?

Mr. Christie: We will start to act on that as soon as the bill is passed. I am arranging with the Deputy Attorneys General of the provinces that as soon as the bill is passed we will convene a meeting to deal with the question of bringing into force the various provisions of this bill. Naturally, we cannot bring it all into force at once. They will have to make arrangements to obtain breathalyzer equipment and to have people trained as analysts and they will also have to set up a licencing procedure in connection with the licencing of lotteries. As soon as the bill passes the Senate we will be setting up a conference at which we will seek to work out these problems.

Senator Smith: And then it is up to the attorney general of each province to get in touch with his local representatives in the various towns and cities and let them know what the new law is. It certainly is a complicated procedure.

Mr. Christie: I know it is. There will also be a public distribution of this bill. I am sure I have already sent out of my office five or six hundred copies of it.

The Chairman: Does the preamble carry?

Hon. Senators: Carried.

The Chairman: Does the title stand?

Hon. Senators: Agreed.

The Chairman: Do I report the bill without amendment?

Hon. Senators: Agreed.

The committee adjourned.





First Session—Twenty-eighth Parliament

1968-69

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 14

Complete Proceedings on Bill S-39,

intituled:

"An Act respecting Boy Scouts of Canada and to incorporate
L'Association des Scouts du Canada."

WEDNESDAY, JUNE 18, 1969

WITNESSES:

Mr. J. Percy Ross, Chief Executive, Boy Scouts of Canada. Mr. Charles
D'Amour, Commissioner General, L'Association des Scouts du Canada.

REPORT OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	*Flynn	McGrand
Aseltine	Gouin	Méthot
Bélisle	Grosart	Petten
Burchill	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly (<i>Ottawa West</i>)	Hollett	Roebuck
Cook	Lang	Smith
Croll	Langlois	Urquhart
Eudes	Macdonald (<i>Cape</i>	Walker
Everett	<i>Breton</i>)	White
Fergusson	*Martin	Willis

(Quorum 7)

*Ex officio member

ORDERS OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Tuesday, June 17th, 1969:

"Pursuant to the Order of the Day, the Honourable Senator Lamontagne, P.C., moved, seconded by the Honourable Senator Paterson, that the Bill S-39, intituled: "An Act respecting Boy Scouts of Canada and to incorporate L'Association des Scouts du Canada", be read the second time.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

With leave of the Senate,

The Honourable Senator Lamontagne, P.C., moved, seconded by the Honourable Senator Benidickson, P.C.:

That Rule 119 be suspended with respect to the Bill and

That the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

Wednesday, June 18, 1969.

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10.00 a.m.

Present: The Honourable Senators Roebuck (*Chairman*), Burchill, Eudes, Everett, Fergusson, Gouin, Macdonald (*Cape Breton*), McGrand, Smith, Urquhart and Willis.

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Bill S-39, "An Act respecting Boy Scouts of Canada and to incorporate L'Association des Scouts du Canada", was considered.

The following witnesses were heard:

Mr. J. Percy Ross,
Chief Executive,
Boy Scouts of Canada.

Mr. Charles D'Amour,
Commissioner General,
L'Association des Scouts du Canada.

On motion of the Hon. Senator Urquhart, it was resolved to report the Bill without amendment.

At 11.00 a.m. the Committee adjourned to the call of the Chairman.

ATTEST.

John A. Hinds,
*Assistant Chief,
Committees Branch.*

REPORT OF THE COMMITTEE

Wednesday June 18th, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred the Bill S-39, intituled: "An Act respecting Boy Scouts of Canada and to incorporate L'Association des Scouts du Canada", has in obedience to the order of reference of June 17th, 1969, examined the said Bill and now reports the same without amendment.

All which is respectfully submitted.

A. W. Roebuck,
Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Wednesday, June 18, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-39, an Act respecting Boy Scouts of Canada and to incorporate L'Association des Scouts du Canada.

Senator Arthur W. Roebuck (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have a quorum and it is time we commenced. We have referred to us today Bill S-39, respecting Boy Scouts of Canada and to incorporate L'Association des Scouts du Canada. I find it a little difficult to get the names clear in my mind. The relationship between these two organizations is quite confusing. I see that by clause 1 of the bill the name in French of "Boy Scouts of Canada" is changed from "Scouts du Canada" to "Les Boy Scouts du Canada". Then, by clause 2 the various officers of an unincorporated association known as "Les Scouts Catholiques du Canada" which is herein-after called "L'Association" are incorporated under the name of "L'Association des Scouts du Canada". In other words, it will be noticed that the word "Catholiques" has been dropped from the name.

Senator Fergusson: Was it ever in?

The Chairman: Yes.

Senator Gouin: They would not use it any more.

Senator Burchill: But it is in that incorporation section. Senator Leonard who spoke yesterday in favour of the bill because of the fact that the word "Catholiques" is dropped from the title, is unhappy this morning because he has discovered that it is in this section.

The Chairman: Yes. I think that that is perhaps the only really contentious matter that is before us. I would like to clear away some of the problems that are bothering me before we come to that, Senator Burchill.

Senator Fergusson: Mr. Chairman, could we have the witnesses explain it, because I think we are all confused.

The Chairman: Yes, we will come to that after we clear away some of the other problems that precede it. We have with us the Parliamentary Counsel, Mr. Hopkins. He has other duties to perform this morning in connection with other Senate committees, as you are all well aware . . .

Senator Urquhart: Why cannot we get down to the gist of the thing? What is the purpose of the legislation? Is it merely to change the name in French?

The Chairman: Let me finish what I am saying. I have in mind how we should proceed. We cannot keep the counsel here all morning. The others will have to come in due season. One of the thoughts that crossed my mind was as to whether this bill had been submitted to the Corporations Branch, and whether our officials have approved the phraseology and so on of the various sections. I want Mr. Hopkins to tell us what has taken place in that respect.

The Law Clerk: Honourable senators, this is an unusual bill. In effect, it is divided into two parts. The first part is clause 1, and it is self-contained. It changes the name in French of the regular Boy Scouts from "Scouts du Canada" to "Les Boy Scouts du Canada". That relates to the name in French only, and that is the only thing that that clause does.

That was made necessary, if I may put it in that way, because the other organization with which the Boy Scouts have reached an agreement after many years of negotiation wanted to use the name which the Boy Scouts formerly had as their French name.

The balance of the bill, from clause 2 to the end, is what we used to simply call a private bill for the incorporation of an eleemosynary or charitable body.

Senator Urquhart: And there is nothing unusual in it?

The Law Clerk: No, those are all standard clauses. As a matter of legislative policy or practice in the Senate since the amendment of the Canada Corporations Act has made possible the incorporation of such bodies by the Corporations Branch, we have followed the practice of not incorporating by Act of Parliament those corporations that could be incorporated by the Corporations Branch. We pointed that out to the incorporators in this case, and the matter was taken up not once but three times with the Corporations Branch. I have here a letter from Mr. Lesage, the Director of the Corporations Branch, which I should like to read into the record.

The Chairman: Yes.

The Law Clerk: He replied to my questions as follows:

Receipt is acknowledged of your letter of May 26 and the only comment I have to make concerning clause 1 of the proposed bill . . .

That is the one which changes the name in French of the Boy Scouts of Canada.

. . . is that it meets clause 27 of Bill C-198 which was deposited last Thursday in the House of Commons.

What he means by that is that there is a bill now before the House of Commons that would make it possible for what is sought to be accomplished by clause 1 to be accomplished by Letters Patent rather than by an Act of Parliament, but that bill has not yet become law.

Senator Urquhart: There is no quarrel with that?

The Law Clerk: No, there is no quarrel with that. Mr. Lesage goes on to say . . . and I want to read this so that the members of the Committee will have a full understanding of the background:

Unless there is a real urgency, the petitioners would be well advised to wait until the said clause amending section 208A of the Canada Corporations Act will have been sanctioned by Parliament.

That is just an opinion of the Corporations Branch. It does not bind anybody.

In so far as the second part of the Bill is concerned . . .

That is the part that contains the standard clauses of incorporation such as the Miscellaneous Private Bills Committee used to deal with. We did not anticipate any more such bills, and as a result the Miscellaneous Private Bills Committee has been abolished. Nevertheless, here we are with this bill.

The Director of the Corporations Branch continues:

In so far as the second part of the bill is concerned, the authority conferred upon the Minister of Consumer and Corporate Affairs to issue Letters Patent is certainly broad enough as it stands to achieve the purposes sought by the applicants.

Now, in passing this . . .

Senator Fergusson: Would you mind reading that last paragraph again?

The Law Clerk: No:

In so far as the second part of the bill is concerned, the authority conferred upon the Minister of Consumer and Corporate Affairs to issue Letters Patent is certainly broad enough as it stands to achieve the purposes sought by the applicants.

Now, in passing that act and conferring this power upon the Minister of Consumer and Corporate Affairs, the Senate did not abandon its legislative jurisdiction, and it can, in an appropriate case, do what is contemplated by this legislation. In other words, there is no constitutional objection and no parliamentary objection to this bill.

I understand it was part of the agreement between the two bodies. I have been in touch with the Boy Scouts, particularly their honorary counsel who is a member of the firm of Gowling, MacTavish & Company, and also with Mr. Joyal, who does not appear to be here today but who has been retained as counsel, and I also took the matter up with the Clerk of the Senate because, this being a matter of policy and not of strict law, I cannot restrain the introduction of legislation, and I would not wish to do so, and also I would not wish to intervene in a matter of policy like that. So, it was arranged that since the sponsors wished to go ahead, and considering the length of the negotiations and the nature of the agreement, it seemed that the only thing that could satisfy all parties was a bill in this form.

That is about as far as I can go.

The Chairman: The letter that you read does not of itself say that the Corporations Branch has looked over the various clauses, and that it is satisfied with them.

Senator Urquhart: But they are the standard clauses.

The Law Clerk: Yes, they are standard clauses such as we have been dealing with for twenty years.

The Chairman: But are you telling us that in fact the department will not say later on that we have acted without their consent?

The Law Clerk: There is no doubt about that. It is now a matter of policy as to whether the committee wishes to pass this bill.

The Chairman: You have made that perfectly clear, but usually a bill of this kind has the approval of the officials of the department. If there is an insurance bill before a committee the Superintendent of Insurance appears and says that he has looked the bill over, and that all its clauses are satisfactory. There is no representative here today from the Corporations Branch. Are we assured by you that they have looked over these clauses, and are satisfied with them?

The Law Clerk: Well, only by implication from this letter. All I can tell you, Mr. Chairman, is that the practice never was to refer these matters to the Corporations Branch when they were dealt with by the Miscellaneous Private Bills Committee. Because of the technical nature of the subjects of insurance and banking, the Department of Insurance was always consulted. In respect of such matters as this we have merely followed our own precedents set over the years, and no objection has been taken.

Before the law was changed we had in mind the possible production of a model bill that would perhaps modernize the standard clauses somewhat. However, these are the standard clauses.

The Chairman: And you have looked them over and are satisfied with them?

The Law Clerk: There is the implication here too that they have looked the bill over, and they have raised no objection. They merely state that it will be possible to accomplish the same thing under the Corporations Act.

The Chairman: And your answer is that you have looked over the clauses and are satisfied with them?

The Law Clerk: Oh, yes, I have to do that.

The Chairman: Well, that is a preliminary. There are four persons present representing the parties. There is Mr. Charles d'Amour, Commissioner General, L'Association des Scouts du Canada; Mr. J. Percy Ross, the Chief Executive, Boy Scouts of Canada; Mr. Leslie C. Houldsworth, Director of Administration Services, Boy Scouts of Canada; and Mr. Jean Tellier, Deputy Commissioner General, L'Association des Scouts du Canada.

We will be glad to hear any one or all of you in the order in which you care to address us, gentlemen.

Mr. J. Percy Ross, Chief Executive, Boy Scouts of Canada: Honourable senators, it is a pleasure for me to appear before you to tell you of the earnest desire of the Boy Scouts of Canada to get on with the job of

incorporation of this separate body. Negotiations have been going on since 1935 in respect to this matter, and because of these negotiations I think that boy scouting in Canada has suffered. It is the aim of both of these associations to take care of the problems of youth within the Canadian family, and there are so many problems and so many boys that there is opportunity for many other people besides ourselves to take part in this work.

Boy Scouts of Canada feels that it should support this legislation because it is directed towards better control within this unincorporated body that has been in existence since 1935, and which was set up by agreement with Lord Baden-Powell and the French Catholic bishops at that time.

Over the years there has been a growing apart of these two groups because of the discussions that took place, and because we did not seem able to come to any agreement. We were fortunate that under the leadership of General Vanier, when he was Chief Scout, to come together, and to sign an agreement of co-operation, and from that point on we started to make progress. That was really the first step towards bringing these organizations together.

I can tell you from personal experience as the Chief Executive of the Boy Scouts of Canada—a position to which I was appointed a year ago—that the co-operation not only exists within the committee of co-operation which has been set up—there are members of both associations on each of the two associations—but it also exists in the administrative services of the two bodies.

So, we have come together now with a feeling of mutual respect, and with a feeling that we have a job to do in Canada. We feel, after all the negotiations and looking at this for a number of years, that we must press on with the job, and that the Boy Scouts of Canada must give all the support it can to this new body to enable it to be incorporated and to become effective in looking after the French-speaking boys in all parts of Canada, and not only those in the Province of Quebec.

Commissioner Nicholson, the retired Commissioner of the R.C.M.P., was the international commissioner, and he took a great deal of interest in this matter, and he spent a great deal of time over the years in trying to solve the problems that we have. It was really through his leadership that we got to the point of complete co-operation.

One of the things to which Mr. Hopkins called our attention is that when this new bill is passed we can carry out the change in our name under a different operation. We could have waited for that, but we felt that it was necessary to continue to support L'Association des Scouts du Canada so that they can have the same stature in Canada through an act of incorpora-

tion. We ourselves did not want in any way to destroy the act of incorporation that we have, because we feel that this is something that gives us a stature in Canada that letters patent would not give.

I do not know whether you have any questions, but if you have I would be pleased to try to answer them. We have copies of the agreement which exists between the unincorporated body and ourselves. This refers to the committee of co-operation that I mentioned. One other fact that I think you should know is that in the world family of scouting there can be only one body to represent Canada, and that body will still be the Boy Scouts of Canada. It is through this agreement of co-operation that we together are represented on the world body.

For instance, there is a world conference this year in Helsinki to which we will send six delegates, two of which will be from L'Association des Scouts du Canada, and they will jointly represent Canada at that conference.

Are there any questions, gentlemen? I do not want to take up your time by going into all the details, because I am sure you have had an opportunity . . .

The Chairman: Mr. Ross, I am not sure that you are the one to answer this, but I understand that you are dropping the word "Catholiques" from the name of the new corporation. Why are you doing that?

Mr. Ross: Mr. Chairman, I would think that that is a question that L'Association des Scouts du Canada would like to answer. I am particularly concerned with clause 1 of the bill; in the change of the name and the giving up of our former name in French, I would think Mr. D'Amour could properly answer that question.

The Law Clerk: Did I correctly interpret your intention by saying that the reason you are changing your name is to make it more convenient for the other body to have the name of its choice?

Mr. Ross: Yes. The names are very similar, and we felt that they should be dissimilar, so that the public would know that there are two bodies, one looking after the French-speaking boys of Canada, and the other looking after the English-speaking boys.

Senator Burchill: Do you say that the Boy Scouts of Canada will continue to represent Canada and to speak for Canada?

Mr. Ross: That is right.

Senator Burchill: Has the other group any representation of the type that the Boy Scouts of Canada has, or do you speak for Canada without any reference to them?

Mr. Ross: No, they have three members on our national council, and we have three members on their national council. This is the agreement that was brought about under General Vanier's regime as Chief Scout.

The Chairman: Is there anything in the agreement that makes it clear that the Boy Scouts of Canada represents the nation, and is the national organization in some of the situations that will arise, so that there will be no argument between you and a new organization, or between the two organizations?

Mr. Ross: This is looked after in our memorandum of agreement that was put together between the two organizations and which, as soon as the act is proclaimed, will be upgraded and brought into line with the new provisions of the act.

The Chairman: There is a provision in that agreement which makes that clear?

Mr. Ross: Yes, there are provisions that make clear many other things that could not be spelled out in the act. In some communities across Canada there is an equal number of French-speaking and English-speaking boys, and it is necessary to have complete co-operation at the national level. We have in existence across Canada committees at the provincial level in provinces where there are large groups of French-speaking boys, such as in the Province of Ontario. So, problems that were really passed over in the past, and which became really big problems, are now looked after by small committees of co-operation existing at the provincial level. These are not spelled out in the bill, Mr. Chairman, but they are spelled out in the agreement of co-operation.

What we are really trying to do is to serve the needs of Canada. That is the reason for our existence. Why should we not co-operate and try to help each other as we go about this. We realize that in many communities there are small minorities of French-speaking boys, and small minorities of English-speaking boys, and we are serving these localities in a feeling of co-operation.

Senator Smith: You mentioned that there were three members on each of the councils. How many members are there in total on each of the councils?

Mr. Ross: On the National Council we would have between 45 and 50 members. I cannot answer for Les Scouts, and they can mention how many they have.

Senator Smith: I conclude that the addition of the three members from the other association is for the purpose of liaison and co-operation, and not for the purpose of making decisions?

Mr. Ross: That is right. The decisions are made in this committee of co-operation, which has frequent meetings with our national council.

Senator Burchill: I agree with everything you say. I know something about the negotiations. But, as I said this morning, Senator Leonard is disturbed by the fact that the words "Roman Catholics" are still in clause 2, in that the clause reads:

... and the other members of the said unincorporated association and all French-speaking Roman Catholics ...

What about the French-speaking Protestants?

Mr. Ross: That might be a different group of people.

Senator Gouin: Speaking for myself, I have been very active in Les Scouts Catholiques du Canada in the Province of Quebec. I was President of the Association. Various language groups would not, of course, join Les Scouts Catholiques because they were French speaking Protestants, or members of the Greek Orthodox church, and so on.

The Chairman: In what position does that leave the French speaking persons in other provinces who are not Catholics?

Senator Gouin: They would belong purely and simply to what I would call the Canadian Association.

Mr. Ross: Yes, the Boy Scouts of Canada.

The Chairman: We will ask Mr. D'Amour for that explanation. Thank you, Mr. Ross.

Mr. Charles D'Amour, Commissioner General, L'Association des Scouts du Canada: Honourable senators, I am very pleased to be present here this morning. I think Mr. Ross has gone over the situation respecting the two scout associations and the present bill very thoroughly. There was one question asked him that he thought I might be in a better position to answer, and that was as to why the word "Catholiques" was dropped from the title.

The Chairman: Yes.

Mr. D'Amour: During our negotiations the question was brought up that there was in the Boy Scouts of Canada a fairly large number of English-speaking Catholics, and that these boys felt that they were as good church-going members as their French-speaking confreres, and it was felt that it would be better and easier to work together if the French association dropped the "Catholiques" from its official title. So, this was done in that spirit. We dropped the word "Catholiques" and we hoped that by that our Catholic

English-speaking friends in the Boy Scouts of Canada are happier. Are there any further questions on that matter?

I would like to elaborate a little, if you will permit me. Until 1960 all scouting activities in the other provinces outside of Quebec were under the Boy Scouts of Canada. I am from New Brunswick, and I was for ten or twelve years a member of the Boy Scouts in New Brunswick, and we had very few facilities and very little French literature in respect of training courses for French-speaking leaders. As the French-speaking groups in other provinces wanted to have Scout training for their boys, it was decided in 1961 to try to form a Canadian Association that would be open to all French-speaking boys in all provinces.

This is quite contrary to some of the moves that are presently going on in Quebec, but we feel that scouting is a good form of training in citizenship, and that this new body, L'Association des Scouts du Canada, will, with the co-operation of the Boy Scouts of Canada, be able to offer this scout training to more French-speaking boys in all parts of Canada and not only those in Quebec.

The Chairman: Yes. You have dropped the word "Catholiques" from the title, which would make the new corporation more acceptable to Protestants. But then in clause 4 there is this:

The principal object of the Corporation is to educate boys and young men by the establishment, organization, administration, promotion and development of scouting as established by the late Lord Baden-Powell of Gilwell in accordance with the teachings and principles of the Roman Catholic Church, and, without limiting the generality of the foregoing, shall include the following objects ...

And then follow the objects which are all very good. That, of course, excludes the French-speaking boys all over Canada who are not members of the Roman Catholic Church. Why is it necessary to do that? You have just told us that one of the objects of this movement is to provide facilities to the French-speaking young people of Canada, and then at the same time you exclude from the organization the French-speaking boys who are not Catholics.

Mr. D'Amour: I think that that is covered in the agreement of co-operation that Mr. Ross mentioned a while ago. When we reach that agreement of co-operation, the Boy Scouts of Canada accept the fact that we look after the Roman Catholic French-speaking boys who wish to join, and that it looks after the others.

Senator Gouin: As they were doing in the past, Mr. Chairman.

The Chairman: Well, that is a matter to which objection was taken in the house last night. Is there nothing that can be done to make it generally a little more acceptable to everybody?

Mr. D'Amour: I think it is a matter for the two associations. I would think that the number of French-speaking non-Catholic boys is very small, and so far this has not presented any problem to the two associations. I do not say that eventually no problems will arise, but Mr. Ross has already referred to the fact that each association has three members on the other association's national Council. These six members—that is, three from each association—will form a co-operation committee which will immediately study all such problems and matters as they arise and find solutions without delay, so that we shall not have a situation dragging on such as we have had since 1935. Should the problem of serving a greater number of French-speaking non-Catholic boys arise in the future, then I think we have the mechanism to meet that situation when it does arise.

The Chairman: Do you think that a Protestant French-speaking lad could join the organization notwithstanding what is said here in clause 4 of the bill?

Mr. D'Amour: A French-speaking non-Catholic boy could join, and at the local level there are certainly cases of this existing already. We are there to help the boy, and not to find out whether he is a Catholic or a non-Catholic or whether he is a Catholic churchgoer or not a Catholic churchgoer. At the local level in some troops or packs there is no doubt but that there are already non-Catholic French-speaking boys who are members of our association. The total number would not be great, but there are certainly some.

The Chairman: And there is no objection to that?

Mr. D'Amour: That is right.

Senator Everett: What about the antithesis—the case of a French-speaking Catholic boy living outside of Quebec? Would he be able to join the Boy Scouts of Canada?

Mr. D'Amour: Yes, and in Quebec also we have French-speaking Catholic boys who are members of the Boy Scouts. Mr. Ross referred to the minority groups. We do have a few English-speaking Catholic groups in our association. Even if the text of the agreement did not provide for this situation, we have to be practical. These situations do arise, and we meet them with all the brotherhood that scouting has taught us.

The Chairman: With respect to your power to make bylaws and regulations, clause 7(d) reads:

the admission of members to and their dismissal from the Corporation.

So that you have already provided for power to make bylaws to regulate the admission of members to your corporation.

The Law Clerk: And there is no limitation in the bill.

Mr. D'Amour: Yes, because we might find some years from now that situations having developed have become fait accompli, and that conditions of admission and dismissal will be different from what they are today.

The Chairman: And this applies not only for the present but in the future, as you have described. Clause 7 reads:

The Corporation, at its first general meeting and subsequently at any annual general meeting or special general meeting, may make, amend, or repeal bylaws and regulations not contrary to law respecting the carrying out of the objects of the Corporation, particularly . . .

(d) the admission of members to and their dismissal from the Corporation;

Senator Fergusson: The corporation is not the individual scout.

The Law Clerk: The corporation is the body corporate which is called L'Association des Scouts du Canada.

The Chairman: Yes. That helps us a great deal, witness.

Senator Smith: I should like to ask a question about something that was drawn to my attention last evening after the sitting of the house. I do not know whether you have had an opportunity of reading the record of what was said in the Senate last night, but there were one or two senators who had objection to the bill, and one was Senator Fournier, a French-speaking Roman Catholic senator from the Province of New Brunswick, who a year or more ago was one of those who objected to the previous bill before it was brought before the house. He made representations through channels open to him, and he was able to prevent what he foresaw happening as a result of the first bill, namely, that boy scouts in this country would be distinguished according to whether they were Roman Catholics or Protestants. Being a good Roman Catholic, his judgment was that this was not a good thing for scouting.

You have already answered the question in regard to clause 2, but Senator Fournier (Madawaska-Restigouche) told me yesterday that he was also worried about clause 4(c) which gives the new association the power to create, manufacture and sell emblems, badges, decorations, accessories, and so on and so forth. He was concerned that some day soon there would be an entirely different Boy Scout emblem, and he raised the question of whether that was good for Canadian unity. He asked me about this, in view of my association with the Boy Scouts, but I told him that I had not been keeping up to date with events. He asked me if I could tell him whether the Boy Scout emblem in the different European countries, in which different languages are spoken, and so on, differs from the Boy Scout emblem in Canada. Would you have something to say about that?

Mr. D'Amour: There is a worldwide emblem of scouting, and that is the fleur de lis. That is the international emblem, then each national association has its own badge or emblem. There is a crest for each Boy Scout Association—the Boy Scouts of Canada and L'Association des Scouts du Canada. It is quite natural that this be so. It is not to separate the boys, but to identify them as to which association they belong. The boys are proud to show to what association they belong. If they belong to another association within scouting the boys will proudly wear the crest pertaining to their activity. It may be a baseball club or . . .

The Chairman: Has the Boy Scouts of Canada the same power?

Mr. D'Amour: Definitely.

The Chairman: And it is in the same phraseology?

Mr. D'Amour: Yes. As to decorations, the Boy Scouts of Canada has, since its incorporation in 1914, evolved a system of decorations, honours and awards that is very well known. We felt that the new association also needed something similar. So, all boy's honours for heroism and acts of gallantry will be exactly the same, although the crest on it will indicate that it is from one association or the other.

As to decorations for adults in the movement for valued services, we could not very well present to some of our members the decoration of another association, so we had to create our own series of decoration. These were submitted to the committee of corroboration and also to the National Council of Boy Scouts, and it was accepted.

Senator Fergusson: And you are now using those?

Mr. D'Amour: We are now using those, yes.

Senator Smith: That is a very good answer, and I think it will help Senator Fournier (Madawaska-Restigouche), to accept this bill.

Mr. Ross: Mr. Chairman, we have no objection to clause 4(c). Even the Boy Scouts of Canada is restricted in certain ways by its world membership. There seems to be a move on foot now to get all members of the world organization closer and closer to a common identification with all scouts in all countries. This is something that the world organization is working on at the moment. We, I am sure, will be studying this. This is a world body, and there are certain controls put on us by our membership in the world body. Our rules and regulations, and the method of our constitution, have to be submitted and approved by the world association. It is the function of the Boy Scouts of Canada to make sure that within Canada L'Association and ourselves are operating in keeping with the principles of the world organization.

Senator Burchill: I take it that it may be possible to have two organizations in the Province of New Brunswick?

Mr. Ross: Yes.

Mr. D'Amour: Yes, we have groups in New Brunswick at Edmundston, Bathurst and Moncton.

I might mention that when we represent Canada at any international event, like the Twelfth World Jamboree in Idaho in 1967, all members of the Canadian contingent wore the same neckerchief and the same "Canada" crest. There was a maple leaf on the neckerchief, and a "Canada" badge on the shirt. The contingent was led by Air Vice-Marshal Harvey, and he had two assistants in the persons of Fred Finlay from the Boy Scouts of Canada, and Charles D'Amour from Les Scouts du Canada.

Senator Everett: Would you tell me whether this incorporation has been discussed with the Roman Catholic Bishops of Canada, and, if so, what their attitude is?

Mr. D'Amour: They have been approached on the question especially of the dropping of the word "Catholiques" because we did not want the lay members of the association to find themselves out of the church. They were consulted on this, and they agreed. They understood the situation, and they agreed to the dropping of the word "Catholiques" by our association.

Senator Everett: I appreciate that, but I am talking about the actual bill to incorporate a separate French speaking Catholic organization.

Mr. D'Amour: Oh, yes, they agreed to that.

Senator Everett: Let me be more specific. In the City of Winnipeg there are three bishops. Would they all have been consulted?

Mr. D'Amour: I could not answer that one precisely, but I know . . .

Senator Everett: You know of them?

Mr. D'Amour: I know that there is a Canadian Catholic Conference—the C.C.C. They passed a resolution, I think, in 1960 encouraging the creation of a French speaking Catholic organization for all of Canada, because up to that time there was . . .

Senator Everett: Who composes this Canadian Catholic Conference?

Mr. D'Amour: The Catholic Bishops of Canada. Now, who was there and who was not there, I do not know.

Senator Everett: But they did pass a resolution?

Mr. D'Amour: Yes, in favour of the creation of this body for all of Canada, because up to this time it has been only in respect of Quebec.

Senator Everett: What interests me is the fact that Senator Leonard, who is a leading Catholic layman, appears to be concerned about whether the English-speaking bishops, or the non-French-speaking bishops, were consulted.

Mr. D'Amour: This resolution was certainly passed at a meeting of the bishops of Canada in the fall of 1960. I do not know who was present, but all bishops of all languages in Canada were represented at or attended that meeting.

I might add this little comment here as to why the bill was prepared. Mr. Hopkins mentioned a Bill C-198 that would permit the change of a name of a corporation.

Mr. Hopkins: When it is passed.

Mr. D'Amour: We did not know about that possibility and the bill had to be prepared to change the name of Boy Scouts of Canada at that time. We agreed we would petition for a joint bill of which one part would amend the name of Boy Scouts of Canada to give us a chance to incorporate under the name that they had previously had, and the second part would incorporate the new association. That is why we now have the bill before us.

The Chairman: Thank you, witness. There is one more question that I should like to ask our counsel. Was the bill itself properly advertised according to rules?

Mr. Hopkins: Yes, and no objections have been received from any source.

The Chairman: Do any of the other gentlemen present wish to say anything? Mr. Tellier, or Mr. Houldsworth, do you have anything to say? We should be glad to hear from you.

Mr. Tellier: I have nothing to say.

Mr. Houldsworth: I have nothing to add, sir.

The Chairman: Thank you. Now, gentlemen, I think you can withdraw if you like while we discuss the bill among ourselves.

Mr. Ross: There is one other thing that did happen in connection with this bill. We realized there may be some difficulties in the press and we did not want anything that would damage the image of the Boy Scouts of Canada or the association. We have carefully informed as many people as we could about what we were doing. We prepared a paper which we sent to every member of the House of Commons and every member of the Senate. We asked each one of our provincial people to get in touch with their local members, and discuss it with them. We were amazed at the number of letters we got back giving complete support when we presented the reasons for the support of the Boy Scouts of Canada to the bill to incorporate another body.

The Chairman: Thank you.

Senator Smith: Are we going to proceed *in camera*, without being on the record? Is that why you are asking these people to withdraw?

The Chairman: No.

Senator Smith: Why do we not proceed in the usual way? We are either *in camera* or not. If you have a good reason I should like to know what it is.

The Chairman: The reason was to give the members of the committee perfect freedom to discuss this bill amongst themselves, and not in the presence of those who are advocating it. I think it is good practice to do that.

Senator Smith: Then we will have to dismiss the reporter.

The Chairman: No, we would not.

Senator Smith: Otherwise, this is not secret amongst ourselves at all since it forms part of the record. I have not strong views on it, but it is something we do not usually do.

Senator Urquhart: I move that we report the bill without amendment.

Senator Smith: I second that motion.

The Chairman: Is there any discussion? Are you ready for the question?

Senator Fergusson: Yes.

The Chairman: Those in favour of supporting the bill?

Hon. Senators: Carried.

The Chairman: We do it without going over the sections in detail. That involves the carrying of each one of the sections, as well as the preamble.

The committee adjourned.



First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 15

First Proceedings on Bill S-24,

intituled:

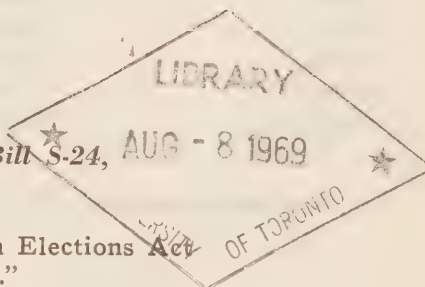
"An Act to amend the Canada Elections Act
(Age of Voters)."

WEDNESDAY, JULY 2, 1969

WITNESSES:

Mr. J. M. Hamel, Chief Electoral Officer. Mr. M. P. O'Connell, M.P.
Mr. R. J. Davey, Director of Population Census, D.B.S. Professor
J. C. Courtney, Professor of Political Science, University of Sas-
katchewan.

REPORT OF THE COMMITTEE



THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue,	*Flynn,	McGrand,
Aseltine,	Gouin,	Méthot,
Bélisle,	Grosart,	Petten,
Burchill,	Haig,	Phillips (<i>Rigaud</i>),
Choquette,	Hayden,	Prowse,
Connolly (<i>Ottawa West</i>),	Hollett,	Roebuck,
Cook,	Lang,	Smith,
Croll,	Langlois,	Urquhart,
Eudes,	Macdonald (<i>Cape</i>	Walker,
Everett,	<i>Breton</i>),	White,
Fergusson,	*Martin,	Willis.

(Quorum 7)

*Ex officio member

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Thursday, June 26, 1969:

"Pursuant to the Order of the Day, the Honourable Senator Argue moved, seconded by the Honourable Senator Sparrow, that the Bill S-24, intituled: "An Act to amend the Canada Elections Act (Age of Voters)", be read the third time.

After debate,

In amendment, the Honourable Senator Langlois moved, seconded by the Honourable Senator Gouin, that the Bill be not now read the third time but that it be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

After debate, and—

The question being put on the motion, in amendment—

The Senate divided and the names being called they were taken down as follows:—

CONTENTS

The Honourable Senators

Beaubien,	Gouin,	Méthot,
Boucher,	Haig,	O'Leary,
Bourget,	Inman,	Paterson,
Bourque,	Irvine,	Petten,
Burchill,	Isnor,	Phillips
Choquette,	Kinley,	(<i>Rigaud</i>),
Cook,	Kinnear,	Quart,
Denis,	Laird,	Robichaud,
Dessureault,	Lamontagne,	Roebuck,
Eudes,	Langlois,	Smith,
Fergusson,	Lefrançois,	Stanbury,
Flynn,	Leonard,	Thorvaldson,
Fournier	Martin,	White—38.
(<i>Madawaska- Restigouche</i>),		

NON-CONTENTS

The Honourable Senators

Argue,	Hastings,	McGrand,
Bélisle,	Kickham,	Pearson,
Benidickson,	Lang,	Phillips
Blois,	Macdonald	(<i>Prince</i>),
Cameron,	(<i>Cape Breton</i>),	Prowse,
Davey,	MacDonald	Sporrow—17.
Grosart,	(<i>Queens</i>),	

So it was resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

WEDNESDAY, July 2, 1969.

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10.00 a.m.

Present: The Honourable Senators Roebuck, Chairman, Argue, Fergusson, Gouin, Macdonald (*Cape Breton*), Martin, Prowse and Willis.

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Bill S-24, "An Act to amend the Canada Elections Act (Age of Voters)", was read and considered.

The following witnesses were heard:

Mr. J. M. Hamel, Chief Electoral Officer.

Mr. M. P. O'Connell, M.P.

Mr. R. J. Davey, Director of Population Census, D.B.S.

Professor J. C. Courtney, Professor of Political Science, University of Saskatchewan.

The following documents were ordered to be printed as Appendices to these proceedings:

A. Result, by electoral district, of the plebiscite held in the province of New Brunswick in 1967.

B. Conference on Electoral Law.

C. Letter from Chief Electoral Officer to Hon. Senator Roebuck.

On motion, it was resolved to print 800 English and 300 French copies of the proceedings on the said Bill.

Further consideration of the Bill was postponed.

At 11.45 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

John A. Hinds,
Assistant Chief,
Committees Branch.

THE SENATE

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Wednesday, July 2, 1969

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-24, to amend the Canada Elections Act (Age of Voters), met this day at 10 a.m.

Senator Arthur W. Roebuck (Chairman) in the Chair.

The Chairman: Honourable senators, this is our first meeting, and at the moment I would judge that there will be no more meetings until the fall. This meeting will therefore perhaps lay the foundation for a great deal of thinking during the recess, until we reassemble in the fall. It may be thought that more copies of the proceedings than the usual 800 in English and 300 in French should be printed. However, if no one thinks we need more than that number, the chair will entertain a motion to print 800 copies in English and 300 copies in French.

Senator Gouin: I so move.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 copies in French be printed.

The Chairman: We have a number of very important witnesses this morning. I will first call upon Mr. J. M. Hamel, the Chief Electoral Officer of Canada, to tell us about the bill, about the act as it stands and give us any related information that he wishes to convey.

Mr. J. M. Hamel, Chief Electoral Officer: Thank you, Mr. Chairman and good morning gentlemen. I do not have any statement to make. There is only one very minor observation that I should like to make with respect to the bill. I believe it is just a technicality that Form 71 might have been omitted from the bill. This is in Schedule 21 of the act in the forms.

The Canadian Elections Act, as it now stands, allows only Canadian citizens or British subjects, who have lived in Canada for a whole year, to vote if they are 21 years of age. The only exception is for members of the forces or veterans who may vote regardless of their age. These are the provisions in the act at the moment.

I have some factual information regarding the voting age in Canadian provinces and also in some other countries. I would be pleased to let you have that information if you so wish...

The Chairman: By all means.

Mr. Hamel: ... unless some honourable senators would prefer to ask specific questions. I have a table here. At the moment in Canada 21 is the legal voting age for a provincial election in Ontario, Nova Scotia, New Brunswick and Manitoba. In Newfoundland, British Columbia and Alberta it is 19 and in Quebec, PEI and Saskatchewan it is 18. This is the situation in Canada.

Senator Martin: Did you give the voting age for Alberta?

Mr. Hamel: Yes, Alberta is 19.

Senator Martin: There are three provinces at 19?

Mr. Hamel: Three provinces at 19, three at 18 and four at 21, in addition to the federal and the federal Elections Act, which also regulates the voting age for the Yukon and the Northwest Territories.

Senator Martin: What is the provision with regard to the required age to be a candidate?

Mr. Hamel: It varies. In some provinces it is the same.

The Chairman: Would you mind giving us the provinces where they are 19 and ...

Mr. Hamel: Quebec. If I may, I should like to make a comparison between the voting age and the minimum age to be a candidate. Everywhere the voting age is 21 and any candidate must be 21. The Quebec voting age is 18, but to be a candidate a person must be 21.

The Chairman: That is in provincial elections?

Mr. Hamel: Yes. The same provision applies for Prince Edward Island. In Newfoundland the voting age is 19, but to be a candidate a person must be 21. In Manitoba it is 21, whereas to be a candidate and to vote it is 19 in British Columbia. In Saskatchewan a person can vote and be a candidate at 18. The voting age in Alberta is 19, but 21 is the minimum age to be a candidate. Finally, New Brunswick is 21 for voting as well as to be a candidate. Speaking of New Branswick, you are probably aware of the referendum that was conducted in 1967 concurrent with the provincial elections. The question asked there, "Are you in favour of lowering the voting age to 18 or not?" I have here a detailed result in New Brunswick on a constituency basis. It turned out to be two to one against lowering the voting age. In fact, there were 51,400 who said yes and 105,644 who said no. Would you mind putting that on the record as it stands? I should like to have this copies. (*See Appendix A*)

Senator Fergusson: Do you know how many, who were entitled to vote, actually voted on that referendum?

Mr. Hamel: I am afraid I do not have the exact figures. I might have them at my office.

The Chairman: Would you let us have them later?

Senator Argue: Might I ask whether any other provinces had a referendum or has there been any other kind of referendum on the voting age that you know about?

Mr. Hamel: Not to my knowledge.

Senator Argue: That is the only one?

Mr. Hamel: That I know of, yes.

Senator Martin: Is there any information on the situation covering the contractual obligation of any candidate in Saskatchewan who may run at 18?

Mr. Hamel: I am sorry, sir, I have no information on this. In Quebec the candidate,

as I said, has to be 21 and I believe the official agents of candidates have to be 21 as well.

Senator Martin: In Saskatchewan?

Mr. Hamel: No, in Quebec. I am sorry, I am not aware of this particular point for Saskatchewan.

As you perhaps know, in the United States there is no uniform—

Senator Martin: Before you go to the United States could you give us an indication in the provinces of what this means by way of increase in the electorate?

Mr. Hamel: I have some figures for Canada as a whole.

Senator Martin: Province by province?

Mr. Hamel: Yes.

Senator Martin: As a result of the change in the age?

Mr. Hamel: Yes. It is based on the 1966 census figures and the only figures we could get were of those people in Canada of the age of 18, 19 or 20. What is the number of those who would not be eligible to vote because they are not Canadians or would be disfranchised for some reason? This is rather difficult to estimate. In 1966, according to the census figure there were 1,014,000 people in Canada in the age groups of 18, 19 and 20. There were 668,000 in the age groups of 19 and 20. By and large, it is roughly 350,000 people per age group—18, 19 and 20. If we were to lower the voting age in Canada to 18 it would add, at the next general election, roughly one million electors.

Senator Willis: Do I understand that any member of the armed services can vote at any age whether in combat duty or not?

Mr. Hamel: That is correct. By virtue of an order in council, passed in 1950 or 1952, members of the regular forces in Canada who are on active duty—the Canada Elections Act speaks of members of the forces on active duty. These people are eligible to vote regardless of their age. If they become veterans, or in other words retire from the forces, after having served after the date of the passing of this order in council they are also eligible to vote regardless of age.

Senator Willis: That would exclude the reserves, would it not?

Mr. Hamel: It does, yes.

Senator Martin: What was the total number of votes cast in the last federal election?

Mr. Hamel: Eight million, two hundred seventeen thousand, nine hundred and sixteen. We had 10,860,000 people on the official list. We had an average of 76 per cent voting.

Senator Martin: As you said, the lowering of the age would be the adding of another million?

Mr. Hamel: Roughly, yes.

Senator Macdonald: Do you have the figures for Prince Edward Island or the number that voted in the last federal election where the age was 21 and the number who voted in the prior provincial election where the voting age was 18?

Mr. Hamel: I have the number of those who voted in Prince Edward Island in the last federal election, but I do not have the provincial figures. It was 51,225 who voted in the federal election out of 58,000 on the list. And in Prince Edward Island in 1966 there were 5,800 people in the age group of 18, 19 and 20, so the percentage is roughly the same in each province.

In the United States, there is no uniform age for voting at federal elections or provincial elections. The State Legislation applies. As a result, there is some difference between states. I believe there are four states where the voting age is less than 21. In 46 states, the age is 21; it is 19 in Alaska; and it is 18 in Georgia, Hawaii and Kentucky.

A couple of years ago, a bill was presented in the American Senate to change its constitution so as to force the states to lower the voting age to 21 but I do not believe it met with too much success.

The Conference of Electoral Law in the United Kingdom, which was chaired by the Speaker of the House of Commons, presented a series of reports. The last report—I believe it was the fifth or sixth report but it is entitled the final report—issued on February 9, 1968, addressed from Mr. Speaker to the Prime Minister, did recommend that the voting age be lowered to 20. I believe that since then Mr. Wilson, the Prime Minister, has announced his intention to lower the age to either 19 or 18.

Senator Martin: What is the Conference on Electoral Law in the United Kingdom that the witness speaks of?

Mr. Hamel: I believe it is a sort of special committee which was appointed either by the cabinet or the House of Commons specifically to study the electoral law.

Senator Martin: Was it a committee of just the House of Commons or was it a joint committee or was it a committee of the House of Lords?

Mr. Hamel: I am sorry, but I would have to check a little further—although I believe it was a joint committee.

Senator Martin: A joint committee?

Mr. Hamel: Yes, I believe it was.

Senator Willis: I do not think it was.

Mr. Hamel: I will have to check into this.

The Chairman: Could we use that Conference report as an appendix, too?

Hon. Senators: Agreed.

(For text of Conference Report, see Appendix B).

Mr. Hamel: There is also some information which goes back to 1967. I do not know whether it is still up to date. It shows the voting ages in different countries, as follows:

Voting Age	Country
21	Canada United Kingdom New Zealand India Belgium Bolivia Central African Republic Denmark Finland France...

And so on.

Voting Age	Country
20	Japan
18	Albania, Argentina Brazil Bulgaria Ceylon Yugoslavia East Germany Hungary Indonesia U.S.S.R. Poland Rumania

Senator Willis: Has Canada ever had a higher voting age since 1867 than 21?

Mr. Hamel: I believe it has been 21 ever since Confederation.

The Chairman: Do you know of any place where they have had a higher voting age than 21?

Mr. Hamel: I believe, yes. I am talking only of memory now. I believe, is it Switzerland. .

Mr. Fournier: No.

Mr. Hamel: There are a few European countries where they have a voting age of 25, and there is at least one but unfortunately from memory I do not remember which country it is.

Senator Argue: Mr. Hamel, the information you have been kind enough to give the committee so far would seem to indicate that there is a definite trend throughout the world to lowering the voting age. Certainly, a number of very important countries, and also provinces, including important provinces in our country, have lowered the age to 19 or to 18. I wonder if you could tell us, from all your studies, whether you have found any countries which have increased the eligible age for voting?

Mr. Hamel: No, I have not.

Senator Argue: In other words, as far as changes are concerned, they have been unanimously to lower the voting age, where the changes have affected the age of voters.

Mr. Hamel: That would appear to be so.

Senator Argue: As Chief Electoral Officer, I suppose you would not see any mechanical difficulties in taking the votes recorded by people age 18, 19 or 20. Would it not be just a question, from your point of view, of the Parliament of Canada's decision to lower the voting age to 18. I am asking this question, if the Parliament of Canada decided to lower the voting age to 18, do you see any mechanical difficulties or any special difficulties.

Mr. Hamel: No sir. Personally, I have no personal opinion.

Senator Willis: Except that it would cost more. The enumerators are paid so much a name.

Senator Argue: It would cost probably a great deal more. There would be more people on the voting register. But do you think your department could do it as efficiently, that is,

your officers, your personnel, your electoral machine, if the voting age were 18 instead of 21?

Mr. Hamel: There would not be any mechanical problem, there is no doubt about that. We would only add additional supplies, create additional polling stations, hire additional electoral officers. From a mechanical and administrative point of view, there is absolutely no problem.

Senator Argue: Good.

Senator Prowse: Have you any information as to whether the provinces which have adopted a lower voting ages have experienced any substantial pattern change in the voting?

Mr. Hamel: I do not believe any study has been made of this subject, so I do not think it would be fair to make any comments because this would be only personal opinions of some people. To my knowledge real political scientists have not made any serious studies of the matter.

The Chairman: Now, witness, have you looked over Bill S-24?

Mr. Hamel: Yes, sir.

The Chairman: Have you any comment to make with regard to the set-up of the bill? Does it seem to be alright to carry the purpose it is intended to carry out?

Senator Willis: He did say that form 31 would have to be included, but it is just a technicality.

The Witness: Form 71.

The Chairman: Have you any further comments to make?

Mr. Hamel: No, sir, but if there are any questions, I shall be happy to answer them.

The Chairman: Does this seem to you to be an effective bill for the purpose it is intended to carry out?

Mr. Hamel: Yes.

The Chairman: Any other questions?

Senator Gouin: What would be the increase in the number of voters in Quebec? Do you have an approximate figure for that? You said that overall in Canada it would be about 1 million, but what would it be in Quebec?

Mr. Hamel: In Quebec it would add approximately 320,000 potential voters.

The Chairman: Do you think you could give us an estimate as to how much it would cost to make this change.

Mr. Hamel: Simply to make the change or the increase in the cost for, say, the next general election?

The Chairman: That is what I mean.

Mr. Hamel: If the fees were the same as they were in the last general election—I have to pose that premise because if we increase the fees the percentage would be the same—in the last general election the cost on an average was \$1.27 per elector. Now if we add roughly 1 million electors it would mean \$1¼ million roughly on the basis of the cost of the last general election.

Senator Argue: \$1¼ million?

Mr. Hamel: That is correct.

Senator Argue: I think that is a fairly small sum of money to bring about this important result.

Mr. Hamel: So far as the change itself and the reajusting of our office is concerned, it would not add anything because we would do a revision of the polling divisions anyway and this would be taken into account at that time.

Senator Prowse: That \$1.27 takes care of the absolute cost including all the costs of the election, does it?

Mr. Hamel: It includes almost everything except the overheads, the cost of operating the office between elections and even during elections and the normal expenses of operating the office such as telephones and so on. It does not include either the additional staff I have to hire during the time an election is held. This is because of a technicality in the Canada Elections Act at the moment. It involves approximately \$130,000 which is very minor compared with the total cost. The overhead which is the normal cost for the operation of the office on an annual basis is \$200,000 a year.

Senator Prowse: The point I had in mind was this; that even in the electoral districts themselves during an election you would only have 1 returning officer or 1 deputy returning officer and an assistant. Now, while you might be increasing some pools, nevertheless at the moment other polls are not fully used. Is this correct?

Mr. Hamel: That is correct.

Senator Prowse: So the probability is that by adding a number of people you would actually bring down the per capita cost or the per voter cost so that this would not necessarily represent a complete percentage increase. Am I right in that assumption?

Mr. Hamel: At the moment each polling division is serviced by a polling station and is set up on the basis of an average of 250 electors. However, there are circumstances which have to be taken into consideration in doing this because of geographical barriers. For example, you cannot extend beyond a river or beyond a railroad track and so on. In many cases this could be the reason why you might have less than 250 voters per polling station and indeed in some cases you might have less than 200. In some cases it would be a real hardship to bring together 250 or 300 people because of distance. Therefore we have to set up fairly small polls sometimes involving 25, 30 or 50 people. So if you had a 10 per cent increase in the number of voters it would not change anything except to the extent that a returning officer is paid so much per name. Furthermore, the enumerator gets 11 cents per name in a rural area and 10 cents per name in an urban area. The only difference might be, and this would be relatively small, the number of polling stations which would not necessarily be 10 per cent larger than they are at the moment, but the cost of the returning officer and the enumerators would be 10 per cent more.

Senator Prowse: If the fees remain the same, the figure you have given as an estimate then would be the top figure and the possibility is that it would be less than that.

Mr. Hamel: I believe your assumption is right; the maximum would be \$1¼ million.

Senator Willis: But no matter how many people vote, the polls must stay open all day. Therefore I do not quite understand what Senator Prowse means.

Senator Prowse: If I might explain what I have in mind; there are some polls that are very busy, in fact almost overwhelmed, when it comes to voting time, but there are others where the votes are cast at a very slow pace all through the day. So what I have in mind is that the polls with a small number of voters and with a minimum of staff could handle the 10 per cent increase without the necessity of increasing the staff at that pole.

Mr. Hamel: That is right.

The Chairman: Mr. O'Connell, have you a question you would like to ask?

Mr. M. P. O'Connell, Member of Parliament for Scarborough East: I have no question, Mr. Chairman, but I would be very willing to support the principle behind the bill, and in fact introduce this Senate bill in the House of Commons.

The Chairman: Is that all you wish to say Mr. Hamel?

Mr. Hamel: Yes, Mr. Chairman.

The Chairman: Then, on behalf of the committee I thank you very much indeed for the splendid amount of information you have given us. It is basic information, and it is something upon which people can form their opinions.

As an illustration of the efficiency with which we do things here I have pleasure in presenting to you a photographic copy of the document entitled "Conference on Electoral Law of the United Kingdom" which you have given us.

Mr. Hamel: Thank you very much, Mr. Chairman. It was my pleasure.

The Chairman: Honourable senators, a letter to be forwarded by Mr. Hamel providing additional information with respect to the Conference on Electoral Law is ordered to be printed as Appendix "C" to these proceedings.

We shall now hear from Mr. Martin Patrick O'Connell, B.A., M.A., Ph.D., member of the House of Commons representing the constituency of Scarborough East. Mr. O'Connell is a captain in the Supplementary Reserves of the Canadian Army. He has been a lecturer in political science at the University of Toronto, and a member of the University Senate. He is also vice-president of the Canadian Civil Liberties Association and, by the way, since we are talking about lowering the age of voting, he has two children.

Mr. O'Connell: They are a few years away from voting, Mr. Chairman.

I was very pleased to have your invitation to attend these hearings, and I would like to speak favourably to the principle behind Senator Argue's bill. There are two similar bills in the House of Commons, and I hope that they too will go before the committee on Privileges and Elections.

My own interest has been stimulated not only on general grounds but also because in my constituency there is a branch of a national young adults' organization known as "Down Three". They have adopted that name because their objective is to get the voting age down three years. I believe a president has been elected from New Brunswick, and the past president or the current president, Miss Margaret Palmer, is from my own constituency of Scarborough East. This is a very active group which is organizing a national campaign directed towards interesting young adults in bringing their influence to bear on this question. I understand it is their feeling that if they do not ask for this then it may be slower in coming than many of them would wish, and, indeed, that has been the experience. We have had many private members' bills over several years—in some years there have been quite a few—and yet the federal Government has not acted.

On general grounds I think one would argue that with the higher level of education of young people today they are certainly better informed than the previous generation. They have had the advantage of modern communications media which help them become aware of public issues. In my own experience I have found that young people of the age of 18 to 21 years are deeply concerned about the social and moral issues, and I would say that that very concern is evidence of a readiness to take on the responsibility of registering a vote.

It would seem to me that with the standards of education, the availability of information, and the active interest and, indeed, involvement in politics, in public questions and social questions, by young people it would be a mistake not to incorporate them into the political process. We are all aware of a good deal of direct social activism and political activism, and although some of that is very useful and makes its point in a dramatic way, it would be better, surely, to incorporate those viewpoints into the political process through the normal political channels, and it would seem to me that political democracy would be well served by so doing.

The very base of the needed volume of social change today, it seems to me, would be better negotiated by parliaments and legislatures if they had the influence of young adults coursing through them in the regular channels. One could also argue, I think, that young people are at the beginning of their

careers, and, surely, as they look at the future they are going to be more concerned about its shape since they are just on the threshold of it, and they are more likely to exercise a salutary influence than a derogatory one on political life.

I think you have already canvassed many of the political questions involved. There will be a roughly ten per cent increase in the voting population if the federal age were reduced to 18. I do not think that that would cause any great disequilibrium or instability in the political process, and I think one would find in young people an equal interest in all political parties. I do not think that their political interest is necessarily concentrated. A lowering of the voting age would add, perhaps, a more idealistic and certainly a more activist element to the political parties, and I think that when we are in a period of social change that is a distinct benefit.

It used to be argued that the federal franchise should not lead but follow the initiatives taken in respect of provincial franchises. There used to be good grounds for that, and I suppose there still are. The lowering of the federal voting age puts pressure on lowering the age of majority. There would be pressures to reduce the age of general accountability, or the age of majority, to 18, and that question falls within provincial jurisdiction. Partly for that reason, perhaps, the federal franchise has lagged behind. But, we find now that a majority of the provinces have reduced the voting age. In three provinces it has been reduced to 19, and in three others it has been reduced to 18, and I think that several provinces have either altered the age of accountability or are considering doing so. In Ontario the Law Reform Commission, as we have been informed by the weekend press, has recommended that the age of majority in Ontario be reduced to 18. The Commission did not include in its recommendations comments on the age for voting, drinking, and one other matter of which I cannot think at the moment, because those subjects are being studied independently by the Government.

The Chairman: When you speak of the age of majority, would you tell us what that involves?

Mr. O'Connell: I think some of the lawyers in the group here would be better able to do that, Mr. Chairman, but it would certainly involve the age at which one could contract to buy and sell property, to assume debts, and

to be responsible for many other transactions. Already one can be married at 18 without parents' consent, can be sued, and can be punished in courts of law.

The Chairman: And be responsible for torts.

Mr. O'Connell: And be responsible for torts. Certainly one of the most persuasive arguments is that the supreme demand of citizenship, military service, is demanded at 18. To the extent that already young adults are sharing adult responsibilities it would seem to me one of the strongest arguments for lowering the voting age. It may not be education, it may not be a number of other things, but at some stage youth is sharing adult responsibilities, and that is coming very close to justifying sharing the right to be part of the decision-making.

The Chairman: At what age can one drive a motor car?

Mr. O'Connell: At 16 in Ontario. I think that is all I wanted to say.

The Chairman: Have you read Bill S-24?

Mr. O'Connell: Yes, I have.

The Chairman: You introduced a bill yourself, which I believe is Bill C-72.

Mr. O'Connell: Yes.

The Chairman: Do you find Bill S-24 effective for the purpose involved?

Mr. O'Connell: I think it is very close in wording to the bill I introduced, as I believe have been others in the house. I think it is effective in doing the job.

The Chairman: Are there any questions from honourable senators? . . .

Thank you very much indeed for coming, Mr. O'Connell. I know you had some difficulty in getting here.

Mr. O'Connell: Thank you very much for listening to me. It has been a pleasure.

The Chairman: We will now hear from Mr. Hopkins. Mr. Hopkins, have you anything to say on the constitutionality of this proposed legislation?

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: Mr. Chairman, honourable senators, in the light of all the excellent speeches that have been made in the Senate I am a little diffident in expressing

my views. However, on request it is my duty to give my best judgment on the constitutional aspects of this bill. The bill should not, I suggest, be considered in isolation.

The Chairman: Why the doubt?

Mr. Hopkins: I do not doubt my opinion.

The Chairman: But why the doubt on the constitutionality of the measure?

Mr. Hopkins: I did not say there was any doubt in my mind.

I think this bill has to be considered in the context of what has been going on in the Senate, the practices and precedents that have been established in the Senate, and particularly in the light of the basic document, the British North America Act. I always believe in going right back to the source in approaching a matter of this kind, and I would call honourable senators' attention to the wording of section 53 of the British North America Act, which I propose to read quite slowly:

Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Berriedale Keith comments in his *Responsible Government in the Dominion*, that:

There is no other provision limiting the power of the Senate with regard either to finance or general legislation.

I agree with that. This is the key provision, and those are its words. There is an associated provision, which is of particular interest to the House of Commons, and that is section 54. From section 54, though it is not binding on us, we can find some aid and comfort in considering this matter:

It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost. . .

and I point out the identity of the language to that in section 53. . .

to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill, is proposed

I say "aid and comfort" because of the known fact that six or seven bills in practi-

cally identical terms have been introduced in the House of Commons without any resolution or imprimatur of the Crown, or approval of the Governor General.

Senator Argue: And debated.

Mr. Hopkins: And they were, of course, debated. As I understand from reading the recent *Hansard*, they have been referred to the appropriate committee of the other place for consideration. The aid and comfort I gain from that is that this kind of legislation certainly was not regarded in the House of Commons as a bill that either taxed or appropriated.

The Chairman: The answer to my question, which you have not come to yet, is that we are proposing the expenditure of money for carrying out the purposes of this bill. It is a question whether that is a constitutional problem, is it not?

Mr. Hopkins: That is the question, but I would go on to say, if I may, with respect, that this bill does not purport to appropriate any money.

Senator Argue: That is right.

Mr. Hopkins: Not only does it not appropriate any money, but any moneys required—and I add this qualification—in addition to those already provided for in the Canada Elections Act, would have to be provided by subsequent parliamentary action, and I would add at this time that Parliament can do everything but bind itself.

Senator Argue: It cannot become law until the House of Commons passes it.

Mr. Hopkins: That is another factor, but I am now saying that the money aspect would have to be dealt with by Parliament as a whole, and a bill would have to be introduced in the House of Commons, if indeed one were necessary. I therefore conclude that the present bill is not a money bill within the meaning of section 53, nor is it a bill that in itself appropriates any part of the public revenue. In its pith and substance, to use lawyers' terms, it is a bill to lower the voting age to 18 and nothing more.

As if that were not enough argument—though I think it is—greater aid, comfort and support to this view may be found in the Canada Elections Act itself. I invite honourable senators to listen to a reading, not of a

chapter from the bible, but of section 60(1) of the Canada Elections Act:

Upon the recommendation of the Chief Electoral Officer,—

who is happily with us today—

the Governor in Council may make a tariff of fees, costs, allowances and expenses to be paid and allowed to returning officers and other persons employed at or with respect to elections under this Act, and may, from time to time, revise and amend such tariff.

It goes a long way to build in the fact of an open-ended appropriation provision. In my mind it is immaterial whether more moneys will have to be appropriated, and certainly most if not all of them are covered in there, are they not, Mr. Hamel?

Mr. Hamel: I believe you should read the last subsection of 60, as well. This is the reason why I made a distinction when I spoke about the costs, because the costs did not include the overhead which is the only part of which appropriation has to be voted in Parliament. For the rest, the cost of running the election is out of the unappropriated consolidated revenue fund.

Mr. Hopkins: There is a flexible appropriation in there for that. I suggest that, to my mind, the present bill is not within the meaning of section 53 an appropriations bill. Here is support for this conclusion, not only in the six or seven bills which have gone forward in the House of Commons without the imprimatur of the Crown, but also in at least five bills that we have dealt with in the Senate within the last little while. I will name them. First and foremost was the Investment Companies Act which by Government design was introduced in the Senate and which has been considerably amended here with no reservations whatever. A practically new bill has gone back to the House of Commons. That bill imposes duties and responsibilities upon the Superintendent of Insurance which will surely require a subsequent appropriation, yet by Government design it was introduced in this house.

I will go on now to the four bills which are companion bills, such as the Trust Companies Act, Loan Companies Act and the two insurance bills. All of those impose considerable added responsibilities and obligations upon the Superintendent of Insurance and they too by Government design were introduced in the

Senate. That is why I say we cannot look at this bill in isolation and disregard everything else that is happening in the Senate. In my opinion we would considerably weaken the position of the Senate if we took the position this was, in itself, a money bill within the meaning of section 53.

The House of Commons does not always agree with our view, but in the case of these last five bills, by Government design at least, they were introduced in the Senate.

In the continuing debates which have gone on between the House of Commons and the Senate as to the power of the Senate to amend or introduce money bills, the lower body has not been consistent. Sometimes it accepts them and sometimes it does not. The remarkable thing is that in *Beauchesne's* Fourth Edition there is an actual form entitled "for Agreeing to Senate Amendments to Money Bills". It reads:

(The amendments having been concurred in): That the Clerk do carry back the Bill to the Senate and acquaint Their Honours that this House hath agreed to their amendments, the Minister of Finance accepting the said amendments with a protest against the right of the Senate to make amendments to money bills.

That is the end of my opinion.

The Chairman: And it was so shortly put. We are perfectly safe on this bill as a matter of constitutional right.

Mr. Hopkins: Yes, in my opinion.

The Chairman: Thank you very much.

Mr. R. J. Davey, of the Dominion Bureau of Statistics, who is the Director of Population Census, is with us also today. He is not personally responsible for the increase in population, but he is responsible for keeping the record of it. I telephoned to the Chief Elections Officer and talked to Mr. Goldberg and he very kindly agreed to send a representative of the department to address us this morning and Mr. Davey is that representative.

Mr. R. J. Davey (Dominion Bureau of Statistics): Thank you, Mr. Chairman. I do not believe that I can add a great deal to what Mr. Hamel has already said, with one exception that the figures I have relate to estimates as of 1968, which are somewhat more current than the 1966 figures that Mr. Hamel quoted. I must also say, as Mr. Manel did, that these figures—I am not going to quote—are not

defined in terms of citizenship qualification in respect to the total number of people 18 plus or 21 plus. In 1968 when the voting age was 21 plus...

The Chairman: Excuse me, to clarify what you said, have there been changes in the citizenship provisions that affect the voting rights?

Mr. Davey: No, there have not, but the figures that I have are in respect to the total population, 18 plus and 21 plus and do not exclude those who would not be eligible to vote, because they did not have citizenship requirements. They are not defined in that respect. I do not think this would be too significant since some 97 per cent of the total population are Canadian citizens. The figures would not be quite in line.

In 1968, the voting age of 21 plus, there would be 11,849,500 eligible voters or 57.1 per cent of the total estimated population of 20,744,000 who would be eligible to vote. By lowering the voting age in 1968 to 18 some 1,122,000 additional persons would be eligible to vote, thus raising the number of potential voters up to 12,961,200. Those 18 plus would comprise 62.5 per cent of the total population as compared to 57.1 per cent to those 21 plus. There would be a significant increase in the proportion participating in the democratic process. Those 18 to 20 years of age today were, of course, born in the years 1949 to 1951 which was a period of rising birth rates that started in the immediate post war years and continued on through to 1957. In future years we can expect an increase in the number of 18 to 21 years of age and of course an increase in the proportion that would constitute the total population. In 1968, as I said before, they number 1,122,000 and would comprise 5.4 per cent of the total population. By 1971 they could number 1,219,200 and constitute 5.6 per cent as an estimate, by 1976, and they could number in the neighbourhood of 1,394,000, and comprise about 6 per cent of the total population, so the proportion they are going to comprise is going to increase in future years.

I took a look at some of the statistics for 1968 with respect to the 21 year olds and those age 18 to 21. Some very interesting observations can be made with respect to what might happen if the voting age was lowered.

In Canada as a whole, in 1968, as I said before, some 57.1 per cent of the population was age 21 and over and thus eligible to vote.

Provincially, however, only three provinces equalled or exceeded this proportion. That is, Ontario with 58.9 per cent, Manitoba 58 per cent and British Columbia 60.1 per cent. All other provinces have a small than average proportion of their population age 21 plus.

The disparity here is considerable in some instances. In Newfoundland, only 47.2 per cent of the population is age 21 years of age and over. In New Brunswick it is 52.4 per cent and even in Quebec and Saskatchewan the proportion is lower than the national average at 56.1 and 56.0.

By lowering the voting age to 18 we would increase the proportion eligible to vote, from a national average of 50.1 per cent for age 21 plus, to 62.5 per cent for age 18 plus, or an increase of 5.4 percentage points.

It seems to me that this increase would have a greater impact on some provinces than on others. For example, in all provinces from Quebec east, the increase in the proportion eligible to vote, resulting from a lowering of the voting age, would be greater than the national average, and in most provinces from Ontario west it probably would be about the same or slightly less than the national average.

This does not mean, of course, that all provinces have an equal proportion of their population eligible to vote, since in general the proportion would be lower in the eastern than in the western provinces. However, it would mean that the provincial disparity from the national average, with respect to the proportion eligible to vote, would be less with the lowering of the voting age from 21 to 18.

The reason for this is fairly obvious, in that in those provinces, those eastern provinces, including Quebec, their proportion of the total number of 18 to 21 year olds is greater than their proportion of the 21 plus. So, by bringing in the 18-20 year olds into the voting process, it naturally means that a higher proportion in those eastern provinces would be participating in the democratic process.

There is one further point, which in effect is a substantiation of Mr. O'Connell's earlier statement, that perhaps the educational qualifications and knowledgeability of those 18 to 21 year olds is probably as great or better than the population age 21 and over.

I have only 1961 statistics to go on that those statistics do show that in 1961, persons age 18 to 20 had an average, a median year of schooling, of 11.0 years, as compared with an

average of 9.3 years for the population age 21 plus. So their educational attainment is obviously higher. By coming into the voting process they would, to a small extent, be increasing the educational attainment of the electorate generally.

Senator Gouin: May I ask a question concerning the proportion of those below 21, and 21 and over, in the Province of Quebec, concerning schooling. You gave us the average for Canada as a whole. Do you have that figure for Quebec?

Mr. Davis: No, I do not have those figures for Quebec specifically but I have no reason to believe that it will be any different from what it is nationally.

Senator Gouin: The only point is that generally in the Province of Quebec people leave school earlier than they do in Ontario.

Mr. Davis: That is right, but the 18 to 20 year olds would generally have a greater educational attainment in the Province of Quebec than those age 21 and over.

Senator Gouin: Thank you.

The Chairman: Thank you very much indeed. You have added considerably to what Mr. Hamel gave us. I was wondering what you would be able to tell us that he had not covered, but you have given some real information, and we thank you for it.

We have one witness left, and I think you will agree with me, when you hear what he has to say, that we have kept the good wine until the last.

Honourable senators, we have Professor Courtney, of the University of Saskatchewan. He is a professor in political science at that university and he has come all the way here to appear at this meeting. For that alone, we are indebted to him. I am sure we will be indebted to him further when he addresses you. Ladies and gentlemen, I give you Professor Courtney.

Professor J. C. Courtney, Professor of Political Science, University of Saskatchewan: Thank you, Mr. Chairman. Honourable senators, I am very pleased that I have the opportunity of speaking to this committee today. I am a political scientist, very interested in Canadian Government, and I have done a number of studies, particularly in the area of voting behaviour and political parties in Canada.

I am also pleased that the Chief Electoral Officer spoke before me, as he was able to present so much of the factual information that I really feel it is necessary to have in order to look at this question properly.

If this meets with your approval, Mr. Chairman, I will read a very short statement and perhaps then there will be some questions.

I think a number of questions could be asked in the area of voting in Canada. The first perhaps is the question of who should have the vote. In looking at this politically and historically we would find in Canada, for example, from the time of the very earliest franchise laws in Nova Scotia, 1757, that a number of restrictions have been applied over the years. These restrictions to the franchise have taken the form of restricting the vote according to property, taxation, sex, education, race, religion, income, nationality, residency and, finally, age.

In other words, there have been a number of complicating factors introduced between the individual and the vote.

By and large, over the years, most of those restrictions have been removed. The only remaining restrictions to which I refer at this point are those dealing with residency, nationality and age.

The second question we might look at is why a person should have the vote. Here I wish to refer very briefly to two arguments used in favour of an individual having a vote. It is argued that the vote is a natural right that should be accorded to man. On the other hand, there is the alternative argument that for the state to legitimize the use of power, the number of individuals participating in the electoral process should be as large as possible.

Now, I think if we recognize that these restrictions have been imposed over the years and fairly recently have been removed, we recognize that both of these theories have validity in political history. I think an important point to recognize is that age, residence, nationality have all been defined as discretionary restrictions. It is very arbitrary, if you like to say that a 22-year old shall have a vote and a 20-year old shall not simply according to standards which are set. That is an arbitrary definition.

Another question to which we might address ourselves is this; why is 21 deemed to be the age that for all intents and purposes

was accepted by and large almost without exception from the 18th century to the middle of the 20th century? I should mention that there was an exception in Quebec prior to 1759. At that time when the old Roman law prevailed 25 was the minimum age, but after 1759 this was changed to 21. Without exception until the last 15, 20 or 25 years in Canada, 21 has been accepted as the minimum age.

Now the final question to which I would like to address myself at this point is; should the voting age be lowered, let us say to 18 as proposed in Bill S-24? I think we have to recognize first of all that if the voting age is lowered, it raises the spectre of a whole plethora of demands for lowering the age for other activities as well. It is not unreasonable to assume that people having the right to vote at 18 might similarly argue that they should be qualified legally to enter into contracts, to own property, to have the right to sue and to serve on juries and so on.

The Chairman: And to enjoy the luxury of being sued.

Professor Courtney: Thus the lowering of the voting age in itself may very well give rise to a number of other demands. This must be recognized. It is not a simple act removed from other legal questions. A number of points are usually mentioned with reference to the lowering of the voting age, and these arguments are the standard ones. For example, if a man is old enough to fight for his country, then he is old enough to vote. We have heard this morning the Chief Electoral Officer give the solution to this problem so far as Canada is concerned. It is, I believe, a unique solution in the western world. In Canada we say, in fact, "if you are in the armed forces, you are entitled to vote regardless of your age."

Similarly, the argument is presented that the young people today are so much better educated than the young people of previous years, and of course we have statistics to support this. One of the points I would like to make here is that you really have to take this in relation to the education not only of the under-21 group but in relation to the over-21 group as well. This becomes a relative matter, and surely one could also argue that the over-21 group is now better educated than was the case a generation or two or three ago. I am not sure that this is a clinching argument in support of lowering the voting age.

Having said that, I will go on to mention a number of points which in my opinion sup-

port the argument that the voting age should be lowered. For example, we know from a number of studies done in Canada and throughout the world that there is now a greater degree of independence of young people from their families and indeed greater mobility of young people. This in turn gives rise to greater self-assurance on the part of individuals and a greater demand on their part to participate in the political process. Similarly the 18 to 20-year olds are given certain responsibilities and are asked to assume certain obligations, for example the payment of taxes. As one of my friends in Manitoba said a number of years ago he was placed in the position of having to pay hospitalization premiums at 18 and yet he had no right to participate in the making of that decision. If 18 to 20-year olds must assume certain responsibilities, they may at the same time ask quite reasonably for the rights and privileges to make sure the responsibilities and privileges are carried out. So, taxation is quite a justifiable argument here.

The Chairman: In other words it is taxation without representation.

Professor Courtney: Yes, and I think this is one of the points that is quite justifiably referred to.

Then, going back to the philosophical basis I referred to at the beginning, regarding a legitimizing basis in the political system, one point that can be made is that the more people participating in the act of forming the government, the greater the sense of legitimacy about the political system. Another point in favour of lowering the voting age is this; given a relatively equal distribution of population by years, then interestingly enough the right to vote at 21 means that 21 is the *de facto* voting age for only one out of every four Canadians, given the 4-year interval between election, if you assume a relatively constant population by years. So 18 then becomes *de facto* for 18, 19, 20 and 21 years of age, if one wishes to look at this in the particular light.

There is another point which might be referred to, and I refer to this as a point more appealing to politicians than to political scientists, because it involves a more pragmatic aspect. When we look at the situation in a number of the provinces in relatively early years in Canada's history in terms of changing the franchise—Alberta in 1944, Saskatchewan in 1945—you find by and large

that these people did not act as a monolithic group in terms of voting. That is to say, they did not act as one solid block; instead they tended to vote for the three or four political parties, as the case may be.

Then finally I think the most important question that needs to be asked and the most important point that needs to be made about 18-years olds having the vote is this; do these people have what I consider to be the absolutely necessary maturity of mind politically and awareness politically to participate meaningfully in the political process. I think when we look at the particular question—and surely this is one that is very debatable and one that is certainly value-packed, if you like—if you come to the conclusion that these people have political maturity and awareness, if they are able to exercise political judgment and are able to act as politically responsible people, then I would say this group is most certainly entitled to take part in the political process. I have found in my own university that by and large this age group has maturity, responsibility and can act quite wisely. Of course there are exceptions, and there can be no question about this, but similarly there are exceptions in the over-21 age group too.

Mr. Chairman, on balance I would favour lowering the voting age to 18.

The Chairman: We have found some irresponsibility in groups over 21 years of age as you have. Would this throw any light on the subject? If you have made a good case for the reduction of the voting age to 18, then why not lower it to 17?

Professor Courtney: Well, I recall hearing a story a number of years ago about Sir Robert Borden. He was asked why the concession roads in Nova Scotia were four miles apart. He thought for a moment and said: "Well, sir, that was deemed to be a reasonable distance." I would think that 18, in the sense of our society and our values and standards, is deemed to be a reasonable age. This is not to say that a number of 17-year olds would not be mature enough to vote, or that a number of 19-year olds would be mature. If I may put it in those terms, I think 18 is arbitrarily defined, and I would argue that it is a not unreasonable age at which to limit the vote.

The Chairman: Thank you. I wanted to see how you would meet that question. Are there any questions from the floor?

Senator Macdonald: Would the witness go along with dropping the age of candidates to 18?

Professor Courtney: I understand from what the Chief Electoral Officer said that in Saskatchewan it is 18, which is something I did not know. I think the two ages would have to be the same.

The other day, while checking some information, I was struck by the fact that in mediaeval England, for example, the age of marriage without consent was for males 14 and for females 12. Again, it is a societal sort of definition.

Pitt the younger was first elected to Parliament when he was 21, and he became Prime Minister when he had just turned 24. It seems to me that if a person is eligible to vote then he must also be eligible to stand for office. I think that one goes hand in hand with the other.

Senator Willis: Mr. Chairman, I think this is the best and fairest presentation we have heard. The witness not only knows his subject, but he has been eminently fair. I congratulate him upon his presentation.

The Chairman: Thank you.

The summer recess is almost upon us, and I am just a little concerned about the fact that it may be thought we are a little unbalanced at this meeting in not having someone who is outspokenly against this bill. I made an effort to get somebody like that, but I was not successful. The reader of the transcript of these proceedings should bear in mind that we have not heard an opponent of the measure. I make that comment, and perhaps that apology, because we have been trying at this meeting of the committee to lay a foundation upon which people might make a judgment. The committee will not meet again until the fall, but the record of these proceedings will be available to anybody who wishes it. I think this is the first time at which this subject matter has been canvassed in this fundamental and factual way, and I am sure we have done a great service to the movements for or against such a measure as this.

I understand that Senator Argue has a question to put to the witness.

Senator Argue: I have had it expressed to me, although not very often, that one of the reasons why a bill like this should not become law is that there are irresponsible

gangs of young people of 18, 19 or 20 years of age concentrated in certain places in Canada and other parts of the world, and that to hand these people the franchise would be a most irresponsible thing for the Parliament of Canada to do because if they act irresponsibly on many other occasions they will act irresponsibly as far as voting is concerned. I wonder if the witness would tell us what his answer to this would be, and whether he thinks there is any validity to this argument.

Professor Courtney: I think it is a question of judgment, Senator Argue. I would say that you have to take this in relation to the temper of the times. Admittedly, there are people who act irresponsibly. I do not think there is any question about that. But, as I pointed out, they are not restricted to any particular age group. Perhaps it is more noticeable in respect of this age group because the numbers would be larger than in any other age group.

The Chairman: Do you think that giving them the added responsibility might tend to make them a little more responsible in their thoughts and attitudes?

Professor Courtney: This was precisely the point I was about to make. I would not look upon this as a gamble. If it is a gamble then I think it is a gamble that would be unwise to take. Once given the vote, it would be very hard to get it back from a group such as this. That fact has to be recognized. So, I would not look upon this as a gamble at all. If it were a gambling situation then I would not be in favour of giving the vote to these people. But, on balance, there is no question in my mind—and this can be substantiated—that when you approach these people with the vote and say: "This is a political democracy and we are asking you to participate in a meaningful way", the majority of them will act responsibly. Unquestionably, there will be irresponsible elements, but given the opportunity to act in a responsible manner I think the vast majority of them will do so.

Senator Argue: Do you think it might alleviate to some extent these difficult situations to which people opposed to this bill refer?

Professor Courtney: I would think not, but again it is very difficult to answer that question. I do not think it would alleviate it. I think some of the most outspoken critics of society today among the young people are the

type that in all likelihood would not vote in any event.

Senator Argue: But the tendency would be for them to act responsibly. This would at least give such people an alternative means of expressing their views. Perhaps this would not be true of the wild-eyed radicals who are the leaders, but it would be of the second and third level people who may be engaging in such activity because they are not allowed to vote.

Professor Courtney: Yes, I think it would certainly take the pressure off some of them. I think that that is true. In my judgment, 85 or 90 per cent of the people in this age group would find this a satisfactory means of participating in the democratic process.

Senator Prowse: Mr. Chairman, I would like to ask a question, or perhaps two, of the witness.

From a practical point of view, would you not think that the 18 to 21-year olds might find it difficult to be members of Parliament or a provincial legislature because it would mean interrupting their education, and so on, and because they have not yet established any kind of financial base?

Professor Courtney: Yes.

Senator Prowse: So even if that were taken away it would be unlikely substantially to increase the number of candidates in the 18 to 21 group.

Professor Courtney: Yes.

Senator Prowse: You may not have this information, but perhaps you could give us an estimate. Are there to your knowledge any substantial number of election candidates at present in the 21 to 25 age group?

Professor Courtney: I would not have the exact figures. I could make a guess, if you like.

Senator Prowse: If you would.

Professor Courtney: It would be a relatively small percentage, perhaps in the neighbourhood of ten per cent, but a growing percentage of the candidates. It seems to me that there are more younger candidates today than perhaps a generation or two ago. That may not be true...

The Chairman: Can D.B.S. give us any assistance?

Mr. Davey: Not in that respect.

Senator Prowse: This bill proposes to lower the voting age to 18, which is a practical thing that has an effect on everybody. Lowering to 18 the age at which somebody has a right to be a candidate would, in effect, be tokenism, would it not? While it would give the right, it would not be a right that could be accepted in the same way as the right to vote.

Professor Courtney: To a certain extent the right to stand for office is tokenism in any event. It is much more likely that members of professions, particularly the legal profession, are able to stand for office than members of other occupational groups. We know, for example, that 0.4 per cent of the total occupational force—I think this is right, and perhaps D.B.S. could substantiate it—is in the legal profession, while 35 per cent of our members of Parliament are lawyers. There is a tremendous disproportion against, for instance, trade unionists, simply because people in the legal profession are...

Senator Macdonald: More public spirited!

Professor Courtney: Well, they have a certain experience and are able to be mobile with much greater ease than those in other occupational groups. Among the 18 to 20-year olds perhaps, given the mobility of young people today, some would fall into the same category as lawyers, and to that extent it would not be tokenism.

Senator Prowse: To take this point a further stage, to which I was leading, accepting your proposition that it would be desirable that the age carrying the right to run for office and the age giving the right to vote should cover the same area, there would still be no objection to taking it one step at a time, extending the voting age in one bill and dealing with the other aspect by amendment to another act, if it were desired to do so, even if there were a time lag.

Senator Willis: May I ask the honourable Senator Prowse a question?

The Chairman: Yes.

Senator Willis: Anybody under 21 could legally contract for the deposit he would have to put up to stand for election, but if he lost his deposit the Government could not collect it under the present law because he is under 21.

Senator Prowse: The Government is pretty smart. They make you put up the money first.

The Chairman: It has to be put up in cash.

Senator Willis: I realize that, but there are other complications, such as with wills.

Senator Prowse: There are many other factors that ought to be considered. Wills, for example, are within provincial jurisdiction and we cannot touch that. The two areas we can touch are those dealing with the right to vote and the right to be a candidate. The point I am making is that if we have an opportunity to do one thing and we think it is right to do it, is it not better to take this one step without holding back until we can bring in everything else and achieve the perfect situation? In other words, half a loaf is better than none.

Professor Courtney: I have two comments on that. First, there would not be a perfect situation. I think there would be objections. However, if it means lowering the voting age with this as a proviso, as a rider, you might say, then I would favour it. This would be my own opinion.

The Chairman: Can the Chief Electoral Officer give us any information on the ages of candidates?

Mr. Hamel: Unfortunately I do not have any statistics, because on the nomination form there is no mention of the age of the candidate. We have only the ages of those who are elected, when their bibliographies appear in the *Parliamentary Guide*. I am inclined to think, with the professor, that there seems to be a tendency for there to be a larger number of younger candidates. In the last election there were a number of candidates in their early 'twenties. This is strictly an impression, because we do not have anything concrete upon which to base that assumption.

The Chairman: We must bear in mind that what we have before us in this committee is a proposal concerning the age at which one has the right to vote, not the age at which there is the right to run for election. Are there any further questions?

Thank you very much indeed, Professor Courtney, for coming all the way down here to give us this enlightening and very acceptable statement.

Professor Courtney: Thank you.

The committee adjourned.

APPENDIX A

RESULT, BY ELECTORAL DISTRICT, OF THE PLEBISCITE HELD IN
THE PROVINCE OF NEW BRUNSWICK IN 1967

Electoral District	Yes	No
Albert.....	847	1,881
Bathurst City.....	1,751	3,555
Campbellton City.....	1,599	2,648
Carleton.....	1,675	4,006
Charlotte.....	850	1,768
Edmundston City.....	1,335	2,456
Fredericton City.....	3,320	11,381
Gloucester.....	6,309	6,010
Kent.....	705	1,377
Kings.....	2,996	7,365
Madawaska.....	1,009	1,607
Moncton City.....	5,182	11,213
Northumberland.....	3,095	7,843
Queens.....	1,197	2,869
Restigouche.....	2,435	3,566
Saint John Centre.....	4,808	9,289
Saint John East.....	2,152	4,727
Saint John West.....	1,684	4,403
Sunbury.....	413	899
Victoria.....	1,888	3,658
Westmorland.....	4,447	8,791
York.....	1,737	4,332
TOTAL.....	51,434	105,644

Total percentage of yes: 33.
Total percentage of no: 67.

APPENDIX B

CONFERENCE ON ELECTORAL LAW
FINAL REPORT
LETTER DATED 9th FEBRUARY, 1968
FROM MR. SPEAKER TO THE
PRIME MINISTER

*Presented to Parliament
by Command of Her Majesty
February, 1968*

LONDON
HER MAJESTY'S STATIONERY
OFFICE

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REPORT
SPEAKER'S HOUSE
S.W.I

9th February, 1968

My dear Prime Minister,

Since I wrote to you on 24th April 1967 the Conference on Electoral Law have held five further meetings; and there have been changes in the membership of the Conference: Mr. J. E. B. Hill, Mr. K. Lomas, Mr. W. H. Loveys and Mr. R. MacLennan accepted my invitations to serve on the Conference in place of Sir Harwood Harrison, Mrs. Dunwoody, Mr. Stratton Mills and Mr. E. Rowlands respectively.

In my letter of 24th April 1967 I indicated that the only item remaining for consideration by the Conference was the minimum age for voting. The Conference have now given their most careful consideration to this matter and they recommend that the qualifying age should be twenty years.

The Conference have now completed their work. For convenience I am attaching to this letter a note of all the recommendations which have been made by the Conferences in Sessions 1965-66, 1966-67 and 1967-68 (Annex A), and a note of all the matters which have been considered by those Conferences and on which they decided not to recommend any change in the law (Annex B). Details of the

voting are given where divisions took place. The work of the Conference has been spread over a period of nearly three years and, in all, the Conferences have held 36 meetings. As Chairman, I should like to express my appreciation to all the members of the Conference for the assistance given to me. We were asked to examine and, if possible, to submit agreed resolutions on various matters relating to parliamentary elections. The Conferences studied with care masses of evidence and documentation from many sources. The co-operative spirit in which the members of the Conference approached their task was a great help in enabling agreement to be reached on a substantial number of the matters which were before us.

The Conference wish to place on record their appreciation of the capable and devoted labours of their joint secretaries, Mr. K. Eddy and Mr. S. C. Hawtrey. C.B., not only for this Conference but also for Mr. Speaker's Conference in the last Parliament.

Yours very sincerely,
(Sgd.) Horace Maybray King.

The Rt. Hon. Harold Wilson, O.B.E., M.P.,
Prime Minister and First Lord of the
Treasury.

ANNEX A

SESSIONS 1965-66, 1966-67 AND 1967-68

Recommendations of the Speaker's Conferences on Electoral Law

FRANCHISE

1. The minimum age for voting should be twenty years.

(The Conference voted on the question that the age should be twenty years; Ayes 24, Noes 1. A motion, that the minimum age should be eighteen years, had been rejected: Ayes 3, Noes 22.)

2. The franchise should be extended to staff of the British Council who are posted overseas and to their spouses when they accompany them.

3. A convicted prisoner who is in custody should not be entitled to vote.

REGISTRATION

General

4. There should continue to be one register each year, as at present.

(This was agreed to by the Conference after a division on the question that two registers should be published each year instead of one as at present. The voting on this issue was; Ayes 11, Noes 11. Mr. Speaker declared himself with the Noes on the ground that a recommendation in favour of a change in the law ought to be supported by a majority of those voting, and the question was therefore negatived.)

5. The date of publication of the register should remain at 15th February but if administratively possible the qualifying date for inclusion in the register should be 1st November.

6. When persons reach the voting age during the period of validity of any register, the date of the birthday should be shown against the name of the elector, and he or she should be qualified to vote in any election held on or after that date.

7. The register should be prepared, where possible, in street or walking order.

8. The Government should arrange for a feasibility study to be made on the use of computer techniques in compiling and keeping up to date the electoral register*.

* We note with satisfaction that a report has now been made by the Home Office and Metropolitan Police Joint Automatic Data Processing Unit (A.D.P. Report No. 92, October 1967).

9. It should be made the duty of a registration officer to ensure an accurate register; and where the return by occupiers as to residents (Form A) is not returned to the registration officer he should take all other possible steps to obtain accurate information for the purposes of preparing the register.

10. Adequate publicity should be given to the importance of completing Form A, and of inspecting the electors lists when they are on public display.

11. Consideration should be given to increasing the maximum penalty prescribed by Regulation 70 of the Representation of the People Regulations 1950 for failing to give information, or for giving false information, for registration purposes.

Members of the forces and their wives

12. The present arrangement for continuous registration of members of the forces and their wives should cease.

13. The Service authorities should in future be required to obtain information for the purposes of registration from any member of the forces who appears to be qualified to be registered whenever similar information is required to be given by a civilian household-er; and it should be the duty of the commanding officer of each unit to see that this is carried out in time for entries to be made in each ordinary register.

14. The obligation on the Service authorities to obtain such information at such times should extend to wives of servicemen in the United Kingdom who are residing in premises maintained by the Service authorities or by the Ministry of Public Building and Works as well as to wives who are residing outside the United Kingdom to be with their husbands.

Crown servants, staff of the British Council and their spouses

15. The system of registration of Crown servants and their spouses, when overseas, should in future be similar to that already recommended by the Conference for members of the forces and their wives; and it should be the duty of the head of mission or department in each country to see that the necessary information is obtained in time for entries to be made in each ordinary register. Suitable arrangements should be made for the registration of the overseas staff of the British Council and their spouses.

Merchant seamen

16. In the electoral register the letters "MS" should be placed against the names of merchant seamen.

17. A merchant seaman should be entitled to be registered in respect of an address at which he is, or but for the circumstances of his employment would be, residing.

18. For the purposes of electoral registration a hostel or residential club should be acceptable as a place of residence of a merchant seaman.

19. Mercantile Marine Offices should take all possible steps to draw the attention of individual merchant seamen to the facilities available for securing their registration as electors; and a separate form should be provided on which merchant seamen can apply for direct registration if they think their names have not been entered on a householder's form.

Persons suffering from mental illness

20. Steps should be taken to bring to the attention of persons completing Form A that a patient who is free to leave from time to time an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or other form of mental disorder may be included on Form A in respect of his ordinary place of residence.

CONDUCT OF ELECTIONS

Absent voting

21. Subsections (1)(b) and (3)(a) of section 12 of the Representation of the People Act 1949 should be amended so as to include among those qualified to be treated as absent voters by reason of the general nature of their occupation, service or employment, wives accompanying their husbands whenever their husbands are so qualified.

22. Spouses of Crown servants, of British Council staff, and of members of the forces should be entitled to vote by proxy as from the time they leave the United Kingdom.

23. Absent voting facilities should be extended to electors who no longer reside at their qualifying address but reside at an address in another constituency within the same borough.

24. Any elector who has appointed a proxy should be entitled to receive a ballot paper if he applies in person at the polling station before a ballot paper has been issued to his proxy.

25. A postal voter who inadvertently spoils his ballot paper should be able to obtain another to replace it.

26. A postal voter who does not receive his ballot paper should be entitled to complete a tendered ballot paper.

27. The declaration of identity to accompany a postal ballot paper should include the address of a person witnessing the declaration.

Official mark

28. Every ballot paper should continue to be stamped with an official mark at the time of issue to an elector, but the requirement that the mark should be either embossed or perforated should be replaced by a requirement that it should be **perforated**.

29. There should be a different official mark for postal ballot papers.

Nomination papers

30. The use of the description "Minister of the Crown" or of a Ministerial office should not be permitted on a candidate's nomination paper.

Public opinion polls and betting odds

31. There should be no broadcast, or publication in a newspaper or other periodical, of the result of a public opinion poll or of betting odds on the likely result of a parliamentary election during the period of seventy-two hours before the close of the poll. (The Conference decided by a majority to recommend this restriction: Ayes 9, Noes 5. The period of seventy-two hours was agreed to by a majority: Ayes 11, Noes 6.)

ELECTION EXPENSES

Legal maximum of candidates' expenses

32. The present arrangements in respect of the legal maximum of candidates' expenses should continue except that the basic figure of £450 in the scale of candidates' expenses should be increased to £750. (This was agreed to by a majority: Ayes 16, Noes 8.)

33. It should be made the duty of the returning officer to give public notice in each constituency of the legal maximum of candidates' election expenses.

Telephones

34. Where it is necessary to install a telephone for the use of a candidate during an election campaign the installation cost and rental should be met out of public funds.

USE OF BROADCASTING

Exemptions from provisions relating to election expenses

35. Broadcasting should be exempted from the provisions relating to election expenses in section 63 of the Representation of the People Act 1949; but a programme covering an election in a particular constituency and including candidates in that constituency should not be broadcast unless all the candidates have agreed to take part personally and are given an equal opportunity to state their views.

Political broadcasting at general elections

36. While the existing arrangements governing the allocation of time for political broadcasting at general elections are broadly satisfactory, the broadcasting authorities should review the arrangements made for broadcasts at election times by minor parties.

Television stations outside the United Kingdom

37. Section (80)(1) of the Act of 1949 should be extended so as to prevent television stations outside the United Kingdom from transmitting any matter with intent to influence voters at an election; and the exception in respect of arrangements made with the British Broadcasting Corporation should also apply to the Independent Television Authority and all their programme contractors.

ANNEX B

SESSIONS 1965-1966, 1966-67
AND 1967-68*Matters which were considered by the
Conferences and on which they
decided not to recommend any
change in the law*

FRANCHISE

1. The extension of the franchise to persons resident abroad, other than persons with a Service qualification and staff of the British Council who are posted overseas and their spouses when they accompany them.

2. Whether a person who is a patient in any establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or other form of mental disorder should be treated as resident there for the purposes of registration.

3. The application to the rest of the United Kingdom of the three months residential

qualification which applies in Northern Ireland.

4. Whether voting should be made compulsory.

REGISTRATION

5. A proposal that a supplementary register should be published each year for the purpose of bringing the annual register up-to-date.

6. A proposal that masters of merchant ships should be made responsible for obtaining information from crew members for the purposes of electoral registration.

7. Whether, in place of the present administrative guidance, the Representation of the People Regulations should require the names and qualifying addresses of Service voters, who have ceased to have a connection with those addresses, to be grouped together at the end of the relevant part of the electoral register.

METHODS OF ELECTION

8. The present relative majority system of election in single-member constituencies.

(The voting on the question that there should be no change in the law was; Ayes 19. No 1. A motion, "That parliamentary elections should be conducted in accordance with the single transferable vote system, more appropriately known as preferential voting with quota counting, in constituencies consisting of from 3 to 7 members", had been rejected, the voting being; Ayes 1, Noes 19.)

CONDUCT OF ELECTIONS

Absent voting

9. The extension of absent voting facilities to electors who are absent from their qualifying address on holiday.

10. A proposal that postal voting facilities should be made available to Service voters overseas in addition to proxy voting facilities.

11. The extension of postal voting facilities to electors on reaching the age of seventy years.

12. Whether special absent voting arrangements should be made for persons admitted to hospital after the last day for claiming absent voting facilities.

13. Whether the ballot paper envelope should be eliminated from the documents sent to postal voters. (The voting on this issue was; Ayes 9, Noes 12.)

14. Provision for a right of objection to names included in the list of absent voters.

15. Whether provision should be made for postal ballot papers returned by inmates of hospitals and institutions to be accompanied by a doctor's certificate of competence to vote.

16. Whether the requirement for a doctor's certificate on an application for absent voting facilities on grounds of blindness or physical incapacity should be dispensed with.

Other matters relating to the conduct of elections

17. The arrangements for marking an elector's number on the counterfoil of the ballot paper.

18. Polling hours.

19. Appointment of polling day as a public holiday.

20. Provisions relating to undue influence.

21. Returning officers for county constituencies.

22. Cost of election petitions and applications for relief.

23. Whether the number of spoilt ballot papers should be published with the result of an election.

24. A proposal that section 104 of the Act of 1949 should be amended so as to require employees to be given time off from work in order to vote without penalty or loss of pay.

25. Whether reference to a candidate's party should be permitted on nomination papers and consequently on ballot papers.

26. Whether the law should specifically provide for the returning officer to have discretion to allow candidates' tellers to be accommodated at polling station premises.

27. Whether a tenant should be permitted to provide a room for use as a committee room for election purposes notwithstanding anything in a tenancy agreement.

28. A proposal that bye-elections should be held within a certain time of a vacancy occurring.

ELECTION EXPENSES

29. Whether election law should require the source and amount of expenditure by political parties on general political propaganda between elections to be declared.

30. Whether expenditure on general political propaganda during the course of an election campaign should be subject to the provisions relating to election expenses in section 63 of the Act of 1949.

31. Whether the amount of the candidate's deposit, at present £150, should be altered; whether a lower proportion of the total votes cast, at present one-eighth, should be sufficient to secure return of the deposit; and whether any such alteration should be supplemented by a requirement that a nomination paper should be subscribed by a substantial number of electors.

32. Whether candidates' expenses should be met out of public funds.

USE OF BROADCASTING

33. Whether the law should be amended so as to limit the returning officer's discretion to permit arrangements to be made for the broadcasting of any part of the proceedings at the count.

34. Whether the definition of "candidate" in section 103 of the Act of 1949 should be amended in such a way as to prescribe an election period during which provisions relating to broadcasts by candidates would apply.

APPENDIX C

CHIEF ELECTORAL OFFICER

Ottawa, July 4, 1969.

The Honourable A. W. Roebuck,
Senator,
Room 259-E,
The Senate,
Parliament Buildings,
Ottawa, Ontario.

Dear Sir:

At the meeting of the Senate Committee on Wednesday, July 2, I undertook to provide additional information with respect to the Conference on Electoral Law as well as to minimum voting age in some European countries, particularly in those cases where it might be higher than twenty-one (21) years of age.

The Conference on Electoral Law was initially set up on May 12, 1965 by the Speaker of the British House of Commons, Mr. Hulton-Foster, at the invitation of the Prime Minister. Twenty-nine (29) Members of Parliament were appointed to serve on that Conference.

The Chairmanship of the Conference was assumed in December 1965 by Speaker H.

Mabray-King who had succeeded Speaker Hulton-Foster. The Conference was reconstituted in 1966 following the general election.

It would therefore appear that this was a Conference of Members of the Lower House only.

According to Encyclopedia Britannica, 1969 Edition (Volume 8, page 122), only in The Netherlands would the minimum voting age be higher than twenty-one (21); it is twenty-three (23). According to the 1968 Edition of the same publication, the minimum voting age was twenty-four (24) in Finland but it was apparently reduced recently since the 1969 Edition of Encyclopedia Britannica gives twenty-one (21) as the minimum voting age for that country.

I hope that the above information will assist in completing the information you already have.

Yours very truly,

J.-M. Hamel,
Chief Electoral Officer.



First Session—Twenty-eighth Parliament
1968-69

THE SENATE OF CANADA
PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE
ON
Legal and Constitutional Affairs

The Honourable A. W. ROEBUCK, *Chairman*

No. 16

Complete Proceedings on Bill C-120,
intituled:

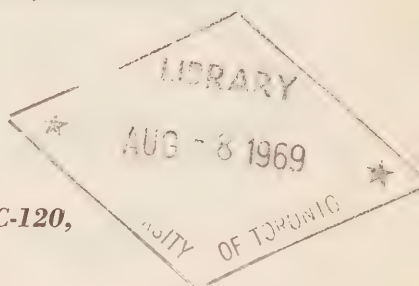
"An Act respecting the status of the official languages of Canada."

TUESDAY, JULY 8, 1969

WITNESSES:

Mr. T. B. Smith, Director, Advisory and International Law, Department of Justice; Mr. Maxwell Yalden, Under-Secretary of State, and Mr. Jules Leger, Secretary of State.

REPORT OF THE COMMITTEE



THE STANDING SENATE COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue,	*Flynn,	McGrand,
Aseltine,	Gouin,	Méthot,
Bélisle,	Grosart,	Petten,
Burchill,	Haig,	Phillips (<i>Rigaud</i>),
Choquette,	Hayden,	Prowse,
Connolly (<i>Ottawa West</i>),	Hollett,	Roebuck,
Cook,	Lang,	Smith,
Croll,	Langlois,	Urquhart,
Eudes,	Macdonald (<i>Cape</i>	Walker,
Everett,	<i>Breton</i>),	White,
Fergusson,	*Martin,	Willis.

(Quorum 7)

* Ex officio member

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Tuesday, July 8th, 1969:

"A Message was brought from the House of Commons by their Clerk with a Bill C-120, intituled: "An Act respecting the status of the official languages of Canada", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,

The Honourable Senator Martin, P.C., moved, seconded by the Honourable Senator Langlois, that the Bill be read the second time now.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Martin, P.C., moved, seconded by the Honourable Senator Langlois, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative."

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, July 8, 1969.

Pursuant to adjournment and notice the Standing Senate Committee on Legal Constitutional Affairs met this day at 8.00 p.m.

Present: The Honourable Senators Roebuck (*Chairman*); Croll, Eudes, Flynn, Gouin, Hollett, Langlois, Macdonald (*Cape Breton*), Martin, Méthot, Petten, Prowse, Urquhart—(13).

In attendance: (but not members of the Committee) The Honourable Senators Dessureault, Yuzyk and Cameron.

Consideration of Bill C-120, "An Act respecting the status of the official languages of Canada", was read and considered. Heard in explanation of the Bill: Mr. T. B. Smith, Director, Advisory and International Law, Department of Justice; Mr. Maxwell Yalden, Under Secretary of State; Mr. Jules Léger, Secretary of State.

A motion by the Honourable Senator Croll, for the Honourable Senator Yuzyk, was submitted as an amendment to Section 38 of the Bill, which reads as follows:

"38. (1) The right to speak and use a language other than either of the two official languages shall not be restrained or restricted in its natural development in any way.

(2) The Governor in Council may by order in council enter into an agreement with the government of any province which has been authorized by legislation so to do, for the purpose of encouraging natural development of any such minority language especially as regards the use of such language in matters of education."

After debate, the question being put, the said motion was passed in the negative.

On motion of the Honourable Senator Hollett, it was *Resolved* to print 1200 English and 600 French copies of the proceedings on the said Bill.

After debate, it was *Resolved* to report the Bill without amendment.

At 9.05 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Gerard Lemire,
Clerk of the Committee.

REPORT OF THE COMMITTEE

TUESDAY, July 8th, 1969.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-120, intituled: "An Act respecting the status of the official languages of Canada", has in obedience to the order of reference of July 8th, 1969, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

A. W. ROEBUCK,
Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Tuesday, July 8, 1969

Senator Croll: What is that?

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-120 respecting the status of the official languages of Canada, met this day at 8 p.m. to give consideration to the bill.

Senator Arthur W. Roebuck (Chairman) in the Chair.

The Chairman: Honourable senators, it is now 8 o'clock and I observe a quorum so I would ask you to come to order.

As you all remember and are aware, Bill C-120 has been referred to this committee for study and report, and of course I am in your hands just as to how we proceed.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 1200 copies English and 600 copies in French be printed.

The Chairman: We have had a debate in the chamber,—a very splendid explanation of the bill and some fine speeches which followed—so I do not suppose that any further explanation or address is required in that respect.

Senator Croll: Mr. Chairman, many of us in this committee are unaware of this bill in the greatest detail. A question was raised this afternoon by Senator Yuzyk as to an amendment to clause 38. He read it. I did not hear it but I tried to follow it. We have got the amendment. Let us deal with it. I do not think there is anyone who has any difficulties on the remainder of the bill. There is just that particular amendment, so if we have got it here we could deal with it.

The Chairman: We have copies of it.

Senator Yuzyk: I have provided copies.

Senator Croll: Does it differ in any respect from the amendment presented to the House of Commons, which was turned down?

Senator Yuzyk: In one respect.

Senator Yuzyk: It is right in the first line. The amendment is being distributed now so that each senator can have a copy in his hand. The change is in the first line adding the words "and use" to the words "the right to speak a language" other than either of the two official languages shall not be restricted in any way. Speaking a language is one thing, but using a language in the written medium should be included.

The Chairman: Do I understand that we have a motion to proceed to the examination and consideration of clause 38? Is that the motion before us?

Hon. Senators: Agreed.

The Chairman: Do I understand that Senator Yuzyk moves a motion, then?

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: Is Senator Yuzyk a member of this committee?

Senator Yuzyk: No.

Senator Croll: I will move the motion on Senator Yuzyk's behalf in order to give him the opportunity to speak on it.

The Chairman: Fine. First I shall read section 38 of the bill, and then I shall read the proposed amendment.

38. Nothing in this Act shall be construed as derogating from or diminishing in any way any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Act with respect to any language that is not an official language.

Now, Senator Croll has agreed to move the following amendment:

That Bill C-120, an act respecting the status of the official languages of Canada, be amended by deleting clause 38 thereof and substituting the following:

38. (1) The right to speak and use a language other than either of the two official languages shall not be restrained or restricted in its natural development in any way.

(2) The Governor in Council may by order in council enter into an agreement with the government of any province which has been authorized by legislation so to do, for the purpose of encouraging natural development of any such minority language especially as regards the use of such language in matters of education.'

Honourable senators, are you ready for the question with regard to that amendment?

Senator Croll: I think we ought to hear Senator Yuzyk.

Senator Yuzyk: I should like to speak to that amendment, Mr. Chairman.

The original clause certainly does not take away any rights that have been gained in any way in any of the provinces for languages other than English or French. However, if you examine the clause, you will note that this clause is rather negative in nature. It leaves the situation as it is at the present day, or whatever may develop, without any participation, shall we say, of the federal agencies or federal Government.

I have discussed this matter with many of the leaders of ethnic groups. The ethnic groups would like to have their languages have some kind of status rather than be left as they are now. This amendment would appeal to them much more in that it would give such languages a status. Moreover, because these languages are not only under provincial jurisdiction but are "Canadian," the federal Government may want to deal with such languages and may even want to encourage the development of some of them, particularly if there is a demand for such languages in the educational system. That is why this amendment is constructed in this particular way.

Since education is a provincial matter, the provinces would deal with the ethnic languages as such, as has been done in the case of Saskatchewan, Alberta and Manitoba, where some of the languages now are taught within the secondary schools and have been pushed down to grade seven in the public schools. They are also taught at the provincial universities of these three provinces.

I understand also that the Government of Ontario has now approved a pilot project in Ukrainian in one of the schools in Toronto. If it is a success, the Ukrainian language will probably be included in the curriculum of the secondary schools, later to be pushed down into the public schools—I hope right down to grade one where languages should be taught. Of course this is on an optional basis. Such courses would be open to anyone wanting to take them. They would not necessarily be restricted to those of the particular ethnic origin.

I mention this in particular, because in Manitoba just last year 13 per cent of those who took Ukrainian were of non-Ukrainian origin. They were of various origins and were simply interested in the language as such and in the Ukrainian culture.

Now, the federal Government does subsidize education. It cannot interfere with the provinces, but the federal Government may in the future decide to encourage, by means of subsidies, some of these languages that could be useful in international affairs and in diplomacy. I think that is why this subsection (2) is included in this amendment. It makes it possible for the federal Government to make arrangements with the provinces to encourage the development of some of these languages, particularly if there is a demand for them.

So my argument is that an amendment of this kind will give status to languages other than the official languages, and I think it will do a great deal to satisfy the ethnic groups that they are not being left out of the picture so far as languages in Canada are concerned. I think they understand that very well.

I think also that this would be a more positive approach to languages rather than leaving them to develop in their own way, and it would be a great encouragement to these ethnic groups to preserve the best of their culture and to weld it into the pattern of the mosaic of Canadian culture.

The Chairman: Senator Yuzyk, you spoke about giving status to the non-official languages by reason of subsection (1). Would you address yourself to the question of what status the non-official languages have now? How would this give any greater status to them?

Senator Yuzyk: I don't think the languages of these ethnic groups have any status in the federal Government at all. They are not even mentioned in this bill, according to clause 38.

Senator Urquhart: They are not mentioned in your amendment either.

Senator Yuzyk: I beg your pardon?

Senator Urquhart: They are not named in your amendment, which is the point you were making with respect to clause 38.

Senator Yuzyk: No, they are not, but the fact that the Government may want to deal with, subsidize or encourage some of these languages, or any of these languages, say, *in toto*, does give these languages a status, because the federal Government can deal with the provinces, if it so desires, and this is the status that I am referring to.

Senator Langlois: There is nothing in the present wording of clause 38 to prevent the Government from doing that.

Senator Yuzyk: No, there is nothing in the present clause to prevent that, but still it is, I think, a little more positive in that the Government may deal with it directly whenever it wants to.

Senator Croll: As I understand it, what the clause says is that the government will not do thus and so, and you say that the effect is that the government will do thus and so, or may at least consider doing thus and so, and that is all it is.

Senator Yuzyk: There is a difference.

Senator Croll: But there is no more difference than that.

Senator Hollett: What is the difference between section 38 as it stands and 38 (1) in your amendment?

Hon. Mr. Martin: I think what Senator Croll has said is very pertinent. Section 38 is all embracing. It says:

Nothing in this Act shall be construed as derogating from or diminishing in any way any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Act with respect to any language that is not an official language.

Now, this bill does not deal with all languages; it is an act respecting the status of the official languages of Canada. Clause 38 is put in as a precaution to indicate that nothing in this bill is intended in any way to derogate from any linguistic rights or the status of any other language group in this country. Senator Yuzyk himself in his very able argument this

afternoon and again this evening acknowledges that the original clause does not take away any rights. He says that he feels, however, that if this particular amendment were adopted in this Official Languages Act that it would give a certain status, but what status would it give other than the status it now has in the country, and a very respected status, I would add. Moreover the amendment deals with matters that have to do with education and this is not an educational bill.

As Senator Urquhart has pointed out, if there is no mention of any specific language in clause 38, there is also no mention, as he said, of any other language in the amendment. Now I do not see how the wording of the amendment before us with the additional words "the right to speak and use" changes the meaning of the amendment originally introduced in the other place where there was a pretty full discussion in committee on a number of occasions as well as in the House itself. It may be useful at this point, Mr. Chairman, to point out that we have here Mr. T. B. Smith of the Department of Justice, and the Undersecretary of State, Mr. Leger, and others of his officials who have gone through this particular matter and this kind of proposal. It might be useful at some point to hear them, if you consider that desirable.

The Chairman: Perhaps we could do that now.

Senator Prowse: I wonder if I might have a chance to say something before you call the witnesses, Mr. Chairman. I have looked through this bill fairly thoroughly and there is no reference anywhere in the bill to education. If you read the bill through carefully, it is obvious that it refers to matters within the sphere of the federal Government. The bill has been drafted so that there is no possibility, or at least in the hope that there would be no possibility that any province would feel that its rights over civil rights and education have been infringed by anything in the bill.

I may say that so far as the proposed clause 38 (1) says that the right to speak another language shall not be restrained, it is not as general as the right in clause 38 as it stands and which says that the bill is not to be interpreted in any way as infringing on the rights to speak a language or use a language or print papers in a language or to interfere in any way with civil rights or education or other matters that do not come under our constitution. Those matters lie completely within the provincial sphere of

legislation and not within ours. This bill deals only with matters coming under the federal service and does not in any way concern matters which come under the jurisdiction of the provinces.

The Chairman: It says here "the right to speak and use a language...". Is there such a right?

Senator Prowse: There is a right that is accepted, I think, in all the provinces to day.

The Chairman: Is it not a common law right?

Senator Prowse: I would not be able to give an opinion on that. The representatives of the Department of Justice might answer that. I know that in Alberta, Ukrainian is taught in the schools and German is available in the schools in addition to French and English. When you go beyond that to the hundreds of ethnic groups in Canada you come up against a practical consideration somewhere.

In Alberta it has been found practical, and I think this is true of Saskatchewan as well, to carry out education in Ukrainian. I would not be surprised if it were found practical to carry out education in Italian in Toronto or Montreal where you get large numbers of Italians. But this surely is a matter which the provinces would consider to be within their sphere to deal with. This might be a situation where representations could be made to the provinces and then the matter could be left to the provinces to take such action as they wished. Certainly in the amendment in clause 38(2) we get into the area of education. Let me say here that radio stations in the Edmonton area regularly carry broadcasts in the French language. In fact there is one French language station there, but other stations also carry French language programs. At least one or two other stations carry broadcasts in Ukrainian and in Dutch and in German as well and I believe there is a station in Kamloops which carries a program in Norwegian.

If we were to pass this amendment we would be entering into the areas first of all of civil rights, and secondly of education where I submit we clearly have no right at all to be attempting to legislate.

The Chairman: Now I shall call upon Mr. Smith of the Department of Justice.

Mr. Smith, you have some familiarity with the proposed amendment already, have you not?

Mr. T. B. Smith, Director, Advisory and International Law section, Department of Justice: That is correct, Mr. Chairman.

The Chairman: Will you give us whatever information you can with respect to it?

Mr. Smith: First of all an amendment along these lines was proposed in the committee study in the other place. I think it is correct to say that there was considerable discussion at that time. It was again proposed during the report stage in the house itself. That is to say it was first proposed in committee and secondly proposed in the house on the report stage in this form with the exception, of course, of the words "and use" which have been added. On both occasions objection was taken to it, and I think the basic grounds for the objection—and I do not want to change the line of your questioning...

The Chairman: No, you just develop your own thought, as it comes to you, and perfectly freely.

Mr. Smith: The basic reason for this rejection on both those occasions was, I believe, that the right that is sought to be accorded in the first subclause is, at least in my opinion, not as adequate protection as exists in clause 38 as it now stands. In other words, as I see it, the amendment is directed to saving, first of all, the rights and privileges of other languages, as they now exist and as they may exist in the future. Secondly, it is directed, if I may use your words, to something positive in the second subclause.

In respect of the first, I feel that it does not do as much saving as clause 38 in its present form. This is, of course, a matter of opinion. It is my opinion that clause 38, as it now stands, is a better saving provision.

The Chairman: Is it broader and more sweeping than the proposed amendment? Is that what you are telling us?

Mr. Smith: Well, might I put it this way. It is a saving provision, first of all, because this bill is dealing with the official languages—it is not dealing with other languages—and its intent is to save, in every respect, rights and privileges which other languages now have or will have in the future; and, as such, I feel that the wording of clause 38 is broader than the wording of the proposed subclause.

The Chairman: May I ask this with regard to clause 38(1), the right to speak and use a

language that is other than the official languages, is there such a right now existing?

Mr. Smith: There is no restriction, as far as I am aware.

The Chairman: So, there is a common law right then, is there? Would I be wrong in saying that there is a common law right to speak any language you please in Canada, there being no restriction?

Mr. Smith: That is perhaps a difficult question. I think because it is not restricted and because, for example, in the Canadian Bill of Rights we have an acknowledgement that there exists the freedom of speech—what that entails I am not too sure, but I think I would rather put it in the negative sense that that is not restricted and, therefore, a person has the right. Until it is restricted by the appropriate legislature of parliament legislating in a constitutional fashion, a person may speak whatever language he wants.

Senator Everett: Do you mean even Gaelic?

Mr. Smith: Yes, senator.

Mr. Hopkins: Might it not be a liberty rather than a right?

The Chairman: What about that question? Would it be a liberty more than a right?

Mr. Smith: When I say it is not restricted, I suppose you could say it is a liberty. Unless and until it is restricted, there is freedom to speak the language one wishes.

The Chairman: Have you ever heard of anyone being restrained in any way from speaking a language other than the official languages, in the past?

Mr. Smith: That is perhaps a question I am not competent to answer, but I have not heard of it personally.

The Chairman: Of anyone ever being restricted?

Mr. Smith: No.

The Chairman: So that the right has been, in practice, complete?

Mr. Smith: Yes, as far as I am aware.

Senator Yuzyk: Could I add my experience to this? I could say, because I have had the experience, that I have been restricted in my rights to speak Ukrainian on the CBC. There have been occasions when I have stated I

would like to say a few words in Ukrainian and they have said, "Absolutely not"; so, that is a restriction and, therefore, when you have a restriction of that kind, there is no right.

Senator Croll: Not on a Ukrainian program?

Senator Yuzyk: No, it was not on a Ukrainian program.

Senator Prowse: I have been through a number of election campaigns in which there were Ukrainian candidates and broadcasts were regularly carried in the Ukrainian language.

Senator Yuzyk: On CBC?

Senator Prowse: Yes, in Edmonton.

Senator Yuzyk: I have been told I could not speak Ukrainian.

Senator Prowse: However, what they required, in every case, was a transcript beforehand, and they required a translation so they would know what was being said, which they did for everybody.

Senator Yuzyk: I have been cut off, when they have been provided with a translation.

Senator Martin: Was that on a local station?

Senator Yuzyk: This was in Winnipeg.

Senator Martin: On the local station?

Senator Yuzyk: Yes, on CBC.

The Chairman: Senator Yuzyk, would you say that clause 38(1), the amendment, would prevent the CBC stopping anyone speaking Ukrainian? Is it designed for the purpose of stopping such a thing as you have described, where they would not let you speak Ukrainian over the air? Would you make it an offence to stop you speaking Ukrainian over the air whenever you wanted to?

Senator Yuzyk: No. Well, this is very difficult to answer, but I think I should have the right, from time to time, when I ask for permission at a particular time to speak on a particular topic, about which I can inform them in advance and even give them the translation of what it is going to be, and, in this case, my experience has been that some of the stations of CBC have not allowed it at all. They do not allow certain programs on the air too—I will say, religious programs—because they are not English or French. Some of the other stations do allow a whole hour of

programs in various languages, but this has been in the CBC.

The Chairman: If we passed this, this would give a greater right to unofficial languages than we are giving in this bill to an official language.

Senator Yuzyk: I would not say that.

The Chairman: But this is the right to use and speak a language whenever you want to over the CBC. That is involved in this, and it is only with respect to non-official languages.

Senator Prowse: I can say this from my own experience over a long period of time, from 1945, dealing with radio and then TV, in both CBC and private stations, that they require scripts in advance so they can submit them to their lawyers to protect themselves against the possibility of libel, particularly in the case of a controversial subject. It does not happen very often, but it is not an unusual thing for them to say from time to time: "Look, we cannot carry this because our lawyers think there may possibly be a basis for a libel action here." I would think that what Senator Yuzyk has gone into is the same situation.

If a station does not have somebody competent to examine the script and make that evaluation then the operators may not know what they are doing, but they will be responsible. They are the ones who are going to be sued because they are the ones from whom it is likely recovery can be made. It seems to me that the right to use a language other than French or English, which are referred to in the British North America Act, exists by prescription, and is a matter of civil rights.

Mr. Smith, do you agree with my suggestion that the right to use and to speak a language, if it is a right at all, is a civil right?

Mr. Smith: That may well be, but there may also be certain areas that are within federal competence which do not involve legislating in reference to language or civil rights *per se*, but with, say, penitentiaries, the criminal law, or something like that. I do not think one can make a broad generalization, but there must certainly be areas within provincial jurisdiction in respect of which they may legislate as to language.

The Chairman: Senator Hollett, I cut you off unintentionally, so if...

Senator Hollett: I did not have much to say, Mr. Chairman, because I do not think

there is very much to say, but I note that this bill is entitled: "An Act respecting the status of the official languages of Canada." That has nothing to do with any other language at all. I do not think the senator is correct in bringing forward this amendment having to do with other languages. This bill is concerned only with the two recognized official languages. If anything is to be done about the other languages then it will have to be done through a new piece of legislation apart altogether from this. I do not think we should mix the official languages up with other languages.

That is what I had in mind. I think we are wasting our time in considering this amendment. As a matter of fact, I can see no difference between clause 38, and the suggested Clause 38(1). Clause 38 reads:

Nothing in this Act shall be construed as derogating from or diminishing in any way any legal or customary right or privilege acquired or enjoyed either before or after he coming into force of this Act with respect to any language that is not an official language.

The suggested clause 38(1) reads:

The right to speak and use a language other than either of the two official languages shall not be restrained or restricted in its natural development in any way.

There is no difference in that. I do not think we should consider amending clause 38 because this bill has only to do with the official languages. There is nothing on our statute books forbidding me to speak Greek if I wish to. This bill does not restrict my right to do that.

Senator Prowse: At best what we are doing is saying the same thing in other words. Perhaps we should say a little less.

The Chairman: It is more specific. Is there not a method of using a language other than speaking it? Does "use" include broadcasting, for instance, or printing?

Senator Yuzyk: It includes speaking, writing, and broadcasting.

The Chairman: Writing is not mentioned here. I am wondering what is included in the word "use". I am pointing out that when you become specific you frequently limit the application of the thought, while you can generally cover everything by using broad terms

such as in clause 38. Clause 38 includes the phrase "any legal or customary right or privilege", which covers everything, while "speak and use" may not cover everything.

Senator Prowse: There are also the words "acquired or enjoyed either before or after the coming into force of this Act". Clause 38 covers everything.

The Chairman: Mr. Smith, let us turn to the proposed subsection (2), which reads:

The Governor in Council may by order in council enter into an agreement with the government of any province which has been authorized by legislation so to do, for the purpose of encouraging natural development of any such minority language...

Is that right not now in existence?

Mr. Smith: I would have said, Mr. Chairman, that the purpose of this amendment presumably foresees the payment of money; that the federal Parliament would vote money for a certain object, namely, the one mentioned in that subclause. If that were the case presumably you would require an appropriation, and at that time, as the normal course would be, if you wanted Parliament to authorize an agreement, you would say that the vote is for an educational agreement with a province in respect of a language other than an official language in accordance with an agreement entered into with the approval of the Governor in Council, and then would follow an amount of so many dollars.

Senator Croll: But we do that now.

Mr. Smith: Yes. I am saying that this would be the normal way to approach it. I do not think you should anticipate it. You would require a vote anyway.

Senator Martin: But you would not do it through this bill because this subclause (2) has a restricted purpose.

Mr. Smith: I was not addressing myself to that, Senator Martin. I was addressing myself to the narrow question: Would this clause serve any real legislative purpose? My answer is that I do not think it would because legislation would be required for an appropriation in any event, and that legislation would at that time provide for such agreements.

Senator Prowse: This bill does not prevent the Government at any time from taking the action envisaged by the proposed subclause (2).

Mr. Smith: It certainly does not. This is not my particular domain. Mr. Yalden, the Assistant, Under Secretary of State is here and perhaps he could speak to this, but until the Royal Commission on Bilingualism and biculturalism has brought in its report on this very subject I would think that this might be anticipatory.

The Chairman: The right to make an agreement is the subject of subclause (2). Is that right not now in existence, if it does not require the expenditure of money?

Mr. Smith: There is no limitation normally on contracts that the Governor in Council may wish to enter into.

The Chairman: The right to make an agreement now exists, but not the right to spend money.

Senator Croll: The Government would welcome an agreement that would limit the amount of money it is presently spending on education.

The Chairman: Have you anything more to lay before us?

Mr. Smith: I do not think so, Mr. Chairman, unless you have any particular questions.

The Chairman: Are there any questions of Mr. Smith before I call on Mr. Leger?

Senator Martin: Mr. Yalden, the Assistant Under Secretary of State, is with Mr. Smith, Mr. Chairman.

The Chairman: Yes, I beg your pardon, Mr. Yalden. Have you something to add?

Mr. M. F. Yalden, Assistant Under Secretary of State: I do not have a great deal to add. I agree with what Mr. Smith has said, and I agree that it reflects what was said earlier. In support of what Mr. Smith has said about the restrictive nature of the proposed subclause (1) I might add that whereas clause 38 as it is now worded is fully general in nature, and contains a complete saving clause, as he has called it, the wording of the proposed 38(1) causes one to wonder what "restrained or restricted in its natural development" means. There could be questions arising as to what the natural development of

a language is, and what is something other than natural development.

Senator Martin: And that language itself might prove to be restricted to other languages.

Mr. Yalden: That is what I mean; it might indeed prove to be restricted. It says:

The right to speak and use a language other than either of the two official languages shall not be restrained or restricted.

As Senator Prowse has mentioned, it might well prove to be beyond the powers of the federal Parliament in a practical sense. As was mentioned earlier, certain classes are given in, for example, Ukrainian or other languages in certain western provinces. That is strictly within provincial jurisdiction. One would hope it would not occur, but if the provinces chose to stop doing that, they could do so, and nothing in this act, including the statement to the effect that the right to speak and use a language other than either of the two official languages shall not be restrained or restricted, could prevent it. In other words, it could be a rather empty promise in certain circumstances, which I repeat I hope will never arise, but if they did arise they would not be within federal jurisdiction.

The Chairman: Senator Yuzyk, have you any questions you would like to ask Mr. Yalden?

Senator Yuzyk: I am glad to hear these explanations, because they are illuminating. Personally, I would be glad to know of good legislation that can be interpreted broadly enough to defend something and yet not restrict a right, liberty or privilege, whatever it may be. If subsection (2) were in there, which right the Government has at the present time, it would certainly do a great deal to convince the ethnic groups that their languages are taken into consideration. That is why I mention status as such. There are the two official languages. All the other languages have to be related to those two official languages in one way or another. Even on the CBC they have to be related by translation into French or English, so one cannot say the languages are not connected with the official languages. I am sure the official languages would not, if I may so put it, disown the other languages or say they were useless in any way, because those other languages can be helpful in making cultural and literal contributions.

My main concern has been about giving these other languages some kind of status, realizing full well the recommendations of the B and B Commission, which should have been out long ago. I well remember the co-chairman, Mr. André Laurendeau, telling me that the relevant volume was supposed to be out at the end of 1967. It still is not published, and I think this is why the ethnic groups are concerned. Other legislation has been introduced but they seem to be left out in the cold, and they are waiting for something to come later. I can understand that subsection (1) may be more restrictive than the present section, but subsection (2) certainly would not harm clause 38 as it stands now.

Senator Croll: But it is redundant.

Senator Yuzyk: Is it necessarily redundant?

Senator Prowse: Yes, I think it is.

Senator Yuzyk: I am asking lawyers.

Senator Croll: In my view it is redundant.

Senator Prowse: In my view, even adding subsections (1) and (2) as paragraphs (a) and (b) of clause 38, which would give you your cake and let you eat it...

Senator Yuzyk: Leaving out subsection (1) and adding subsection (2)?

Senator Prowse: If you added subsection (2) it would be worse, because in spite of adding in words to say that in spite of the generality of the foregoing the following shall be included, time and time again the courts will take an *ejusdem generis* view of the general intent of what is in a section and then interpret everything as limited within the types of things enumerated below, so any attempt to add would produce a danger of restriction.

Senator Croll: As a matter of fact, I have read clause 38 a dozen times and I am satisfied that it is superbly drafted. I have tried to find holes in it, out of respect for your views, and I just cannot. The draftsmen have covered the waterfront with this in such a way as to anticipate exactly the arguments made here today, and that were made elsewhere time and again. There is no getting away from it, the clause is superb for the purpose it is intended to cover.

The Chairman: It is all inclusive.

Senator Prowse: It begins "Nothing in this Act shall be construed". Obviously they have gone to great lengths to make sure that they

have not impinged on civil rights, or they hope they have not, by saying that this act shall not be used to interfere with civil rights that may exist in the provinces. I agree with Senator Croll, any attempt to tamper with this would defeat the purpose it was sought to achieve. I have a great deal of sympathy with what Senator Yuzyk has in mind, but I think he should talk to people in the provinces and let them take it up through the provincial dominion conference first on the constitution, and on other bills or motions that may from time to time come before us. I cannot see that what is proposed would do anything but perhaps endanger the general protection provided by clause 38.

The Chairman: I would like to hear from Mr. Leger. You have heard the discussion so far, Mr. Léger. Have you any observations to make?

Mr. Jules Léger, Under Secretary of State: I think my two colleagues have covered the waterfront fairly well. Discussions on this clause have now been going on for a long period, and I think Senator Croll's phrase covers the situation, that it seems to have covered the waterfront. The draftsmen had in mind finding a form of words that would indeed protect whatever rights—if that is the right word—may exist. However, if we had before us the report of the B & B Commission on the ethnic groups, the situation might be somewhat different. I do not know when that report will be published, but there is no doubt that until it is, clause 38 covers the field as tightly as it can.

The Chairman: Are there any questions?

Senator Yuzyk: I am glad to hear this. After all, the explanation not only helps me but it helps in my relations with the ethnic groups. As you are aware, a committee called the Canadian Cultural Rights Committee has been set up by the ethnic groups and they are waiting for this report. They were hoping that the report on ethnic groups would appear before the enactment of this legislation. Now, of course, the legislation is before us. It is a good piece of legislation, and I support it in principle entirely. My only interest was to improve at least this section so it would meet with general approval of the ethnic group, so that they will be receiving justice in the best way that is possible. Again, if someone could still help me about the status of languages—I know you will say that the B & B Commission may possibly come out with some recommendations in that re-

spect. If that could be inserted in some way I think it would go a long way to bringing about good relations. This is what I want.

The Chairman: Are there any further observations to be made?

Senator Cameron: I am not a member of the committee, but for 10 years it had been one of my responsibilities as Director of the Department of Extension, University of Alberta to run a radio station. We regularly broadcast lectures, addresses, musical and entertainment programs in the language of ethnic groups, particularly Ukrainian. There was never any question about the legality of doing so then and I would not expect there to be any now with the passage of this bill.

Senator Urquhart: I move that the bill be reported without amendment.

The Chairman: We will have to vote on amendment.

Senator Urquhart: I thought you were withdrawing it.

Senator Yuzyk: I am not withdrawing it. I think if the committee does not approve of it I still have to explain that I made every attempt to at least get status for the languages other than English or French.

The Chairman: There is no doubt, Mr. Yuzyk, you have put up a very good argument and have not surrendered easily at all to the brandishments of the rest of us. I think we have made out a pretty good case that the broad statement is all inclusive or, as Senator Croll stated, it covers the whole waterfront. Anything that is specific in the proposed amendment is really restricted to narrowing it rather than broadening it. If I were in your place I would rather have the clause that is already in the bill. Do not mind my expressing an opinion as everybody else does. Are you ready for the question?

Senator Martin: Before you put the question I would like to say that we are all agreed that Senator Yuzyk has gallantly performed his functions. He can record what I, you and the others have said. We share sympathetically his objectives and it is only because we want to strengthen his position that we feel that section 38, as presently drawn, is more helpful to him in the cause he has so worthily represented.

Senator Flynn: Mr. Chairman, I should like to add to what the Leader of the Government

has said and assure Senator Yuzyk that when the next volume of the B & B Commission is published, if there is any amendment that is suggested by this report to the present legislation, or any new legislation that should be adopted, I would press such legislation so that we will have it as soon as possible.

Senator Prowse: I wonder if I could just join the chorus and say that I think we owe a debt of gratitude to Senator Yuzyk for having raised this question, because it has permitted explanations of the sections which I think will be helpful in an understanding of the bill among those groups who perhaps now are a little confused by it.

The Chairman: Those in favour of the amendment raise your hands. Senator Yuzyk voted yes?

Senator Yuzyk: I have no right to vote.

Senator Croll: I moved the motion, but I am not voting.

The Chairman: Those against the amendment. I declare the amendment lost. The next question is the clause, itself. Does the clause pass?

Hon. Senators: Carried.

The Chairman: Is there any opposition to it? With regard to all the rest of the clauses, are they carried?

Hon. Senators: Carried.

The Chairman: Does the preamble carry?

Hon. Senators: Carried.

The Chairman: Does the bill carry?

Hon. Senators: Carried.

The Chairman: Shall I report the bill without amendment?

Hon. Senators: Agreed.

The committee adjourned.



Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

STANDING SENATE COMMITTEE

ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, *Chairman*

I N D E X

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Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA
PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable E. W. URQUHART, *Acting Chairman*

No. 1

Complete Proceedings on Bill S-21,
intituled:
"An Act to amend the Criminal Code"

WEDNESDAY, MARCH 11th, 1970

WITNESS:

Mr. W. J. Trainor, Criminal Law Section, Department of Justice.

Complete Proceedings on Bill S-22,
"An Act to incorporate National Farmers Union"

WITNESSES:

Mr. Aubrey E. Golden, Counsel; Mr. Roy R. Atkinson, President; Mr. William Langdon, Director; Mr. Douglas L. Yonge, staff member; Mr. John A. Hinds, Assistant Chief Clerk of Committees, Senate.

REPORTS OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable Senators

Argue	*Flynn	McGrand
Aseltine	Gouin	Méthot
Belisle	Grosart	Petten
Burchill	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly (<i>Ottawa West</i>)	Hollett	Roebuck
Cook	Lang	Smith
Croll	Langlois	Urquhart
Eudes	MacDonald (<i>Cape</i>	Walker
Everett	<i>Breton</i>)	White
Fergusson	*Martin	Willis

*Ex officio member

(Quorum 7)

ORDERS OF REFERENCE

Extract from the Minutes of Proceedings of the Senate of March 4th, 1970.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Macdonald (*Cape Breton*), seconded by the Honourable Senator Blois, for the second reading of the Bill S-21, intituled: "An Act to amend the Criminal Code".

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Macdonald (*Cape Breton*) moved, seconded by the Honourable Senator Blois, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative."

Extract from the Minutes of Proceedings of the Senate of Tuesday, March 10, 1970.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator McDonald, seconded by the Honourable Senator Rattenbury, for the second reading of the Bill S-22, intituled: "An Act to incorporate National Farmers Union".

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator McDonald moved, seconded by the Honourable Senator Urquhart, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

With leave of the Senate,

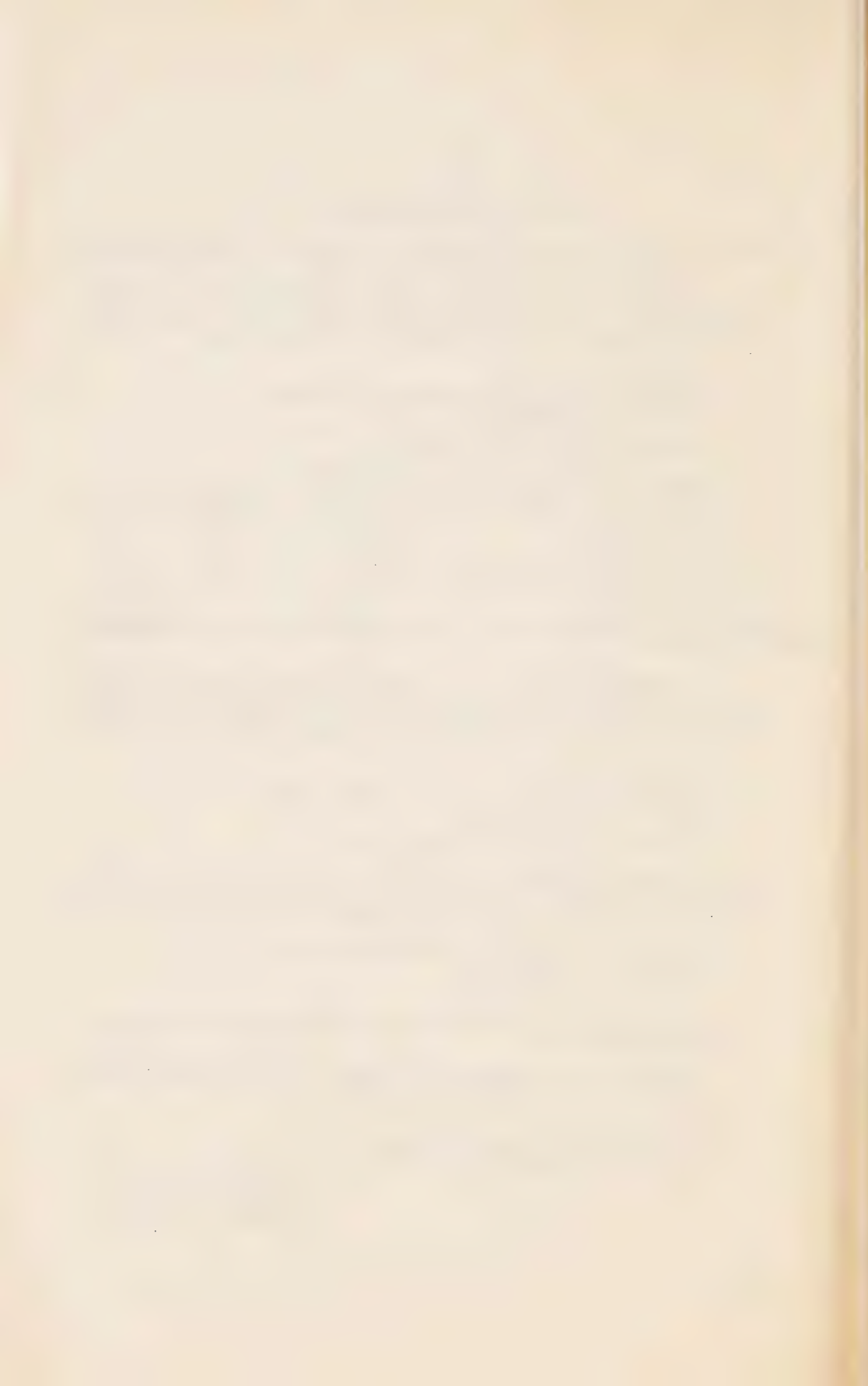
The Honourable Senator McDonald moved, seconded by the Honourable Senator Urquhart:

That Rule 95 be suspended with respect to the Bill S-22, intituled "An Act to incorporate National Farmers Union".

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative."

ROBERT FORTIER,
Clerk of the Senate.



MINUTES OF PROCEEDINGS

WEDNESDAY, March 11, 1970.

Pursuant to adjournment and notice the Standing Committee on Legal and Constitutional Affairs met this day at 10.00 a.m. to consider:

Bill S-21: "An Act to amend the Criminal Code".

Present: The Honourable Senators: Argue, Aseltine, Bélisle, Flynn, Grosart, Haig, Hollett, Macdonald (*Cape Breton*), and Urquhart. (9)

Present, but not member of the Committee: The Honourable Senator McDonald (*Moosomin*).

In the absence of the Chairman and on Motion of the Honourable Senator Macdonald (*Cape Breton*), the Honourable Senator Urquhart was elected acting chairman.

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

It was agreed that 800 copies in English and 300 copies in French of the Committee proceedings be printed.

The following witness was heard:

Mr. W. J. Trainor, Criminal Law Section, Department of Justice.

After discussion and upon motion, it was Resolved to report the said Bill without amendment.

At 10.15 a.m. the committee proceeded to the consideration of Bill S-22: "An Act to incorporate National Farmers Union".

The following witnesses were heard:

Mr. Aubrey E. Golden, counsel;

Mr. Roy A. Atkinson, President;

Mr. William Langdon, Director;

Mr. Douglas L. Yonge, staff member;

Mr. John A. Hinds, Assistant Chief Clerk of Committees, Senate.

After discussion the Honourable Senator Grosart moved that the Bill be amended as follows:—

Clause 6, line 3: delete "it deems" and substitute "are".

The question being put, the committee divided as follows:—

Yeas 3

Nays 3

The motion was declared passed in the negative.

On motion of the Honourable Senator Hollett, it was Resolved to report the said Bill without amendment.

At 11.45 a.m. the committee adjourned to the call of the Chairman.

ATTEST:

Gérard Lemire,
Clerk of the Committee.

REPORTS OF THE COMMITTEE

WEDNESDAY, March 11, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-21, intituled: "An Act to amend the Criminal Code", has in obedience to the order of reference of March 4, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

E. W. URQUHART,
Acting Chairman.

WEDNESDAY, March 11, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-22, intituled: "An Act to incorporate National Farmers Union", has in obedience to the order of reference of March 10, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

E. W. URQUHART,
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS EVIDENCE

Ottawa, Wednesday, March 11, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which were referred Bill S-21, to amend the Criminal Code, and Bill S-22, to incorporate National Farmers Union, met this day at 10 a.m. to give consideration to the bills.

Senator Earl Urquhart (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, thank you for the honour of nominating and electing me as the acting chairman for this meeting of the Standing Senate Committee on Legal and Constitutional Affairs. We have two bills before us today, the first being Bill S-21, an act to amend the Criminal Code. Following the disposition of that bill we will proceed to Bill S-22, an act to incorporate National Farmers Union.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 copies in French be printed.

The Acting Chairman: Honourable senators, Mr. W. J. Trainor of the Department of Justice is the only witness to appear on Bill S-21. I understand that he is mainly in the capacity of an observer, not to object to the bill but to give us any views we might wish to discuss. If honourable senators desire to ask Mr. Trainor questions we will proceed in that manner.

Senator Flynn: We would like his views.

The Acting Chairman: We also have with us the sponsor of the bill, Senator John M. Macdonald with us, so we have the best legal talent in both provinces, Ontario and Nova Scotia.

Mr. W. J. Trainor, Criminal Law Section, Department of Justice: My position with respect to this bill is simply, as has been stated by your chairman, that I am here this morning as an observer only. I am not here officially in a position to express any views of the department with respect to this bill.

Senator Flynn: Are you suggesting that the department has no views on this at all?

Mr. Trainor: We are not taking a position at the moment.

Senator Flynn: You may have views but you dare not express them yet?

Mr. Trainor: That is correct.

The Acting Chairman: So the department is not objecting to the bill?

Mr. Trainor: My position must be, as I have said, one of neutrality rather than taking a positive position of not objecting.

Senator Flynn: Have we any other witnesses, Mr. Chairman, who are ready to express views on the bill?

The Acting Chairman: We have no other witnesses.

Senator Flynn: I then move that we report the bill.

The Acting Chairman: It is moved by Senator Flynn that the bill be reported without amendment.

Hon. Senators: Agreed.

The Acting Chairman: Honourable senators, we will direct our attention now to Bill S-22, an act to incorporate National Farmers Union. We have four witnesses this morning: Mr. Golden, the Counsel for the National Farmers Union; Mr. Atkinson, the President of the National Farmers Union; Mr. Langdon, a director; and Mr. Young, a staff member of the National Farmers Union.

Senator Flynn: Are there officials from any department?

The Acting Chairman: There are no officials from the department.

Senator Flynn: No expressions of opinion.

Mr. E. Russell Hopkins (Law Clerk and Parliamentary Counsel): I represent no department, but I have a letter from the

Department of Consumer and Corporate Affairs, to which all such matters are referred. As you know, we no longer normally incorporate private corporations. That is done by the Corporations Branch, but in certain cases, of which this is one, we are informed by the Corporations Branch that they cannot incorporate. I have a letter here saying:

I wish to confirm Mr. Lesage's advice...

Senator Grosart: To whom is the letter addressed?

The Law Clerk: It is addressed to me. I do this in the ordinary course, under direction.

I wish to confirm Mr. Lesage's advice to Mr. Aubrey Golden, counsel for the incorporators, to the effect the incorporation could not be carried out under the Canada Corporations Act...

If it is to be done at all there must be a private bill.

The Acting Chairman: Is this the only way we can proceed?

The Law Clerk: Yes.

Senator Grosart: Do you know why?

The Law Clerk: Yes, it had to do with the amalgamation provisions. They refer to section 144 of the Canada Corporations Act. Apparently they have been advised by the Department of Justice that when it comes to the amalgamation of companies, some federal and some provincial, they are not competent under the terms of the Canada Corporations Act to so incorporate.

Senator Grosart: Do you have a copy of the act with you?

The Law Clerk: No, I did not bring it.

Senator Aseltine: This is the only way it can be done.

Senator Flynn: Because of clause 2, which says:

2. (1) The Manitoba Farmers Union and the Saskatchewan Farmers Union, hereinafter referred to as the "predecessor corporations", are hereby merged and amalgamated with the Union and shall continue hereafter as one and the same corporate entity as and with the name of the Union.

The Law Clerk: That is right and I was satisfied, together with the Corporations Branch, that if this is to be done it will have to be done by private act of Parliament.

Senator Flynn: Have you any comments on this bill?

The Law Clerk: I am satisfied with the bill.

Senator Flynn: With the form?

The Law Clerk: Yes, and I have so signified to the Chairman.

Senator Flynn: If no one has further comments I would like to report the bill.

Senator Grosart: I would like to come back to questions.

The Acting Chairman: There is a memorandum to Senator Phillips, the Acting Chairman, who is away. It says:

Bill S-22, an act to incorporate National Farmers Union. In my opinion this bill is in proper legal form.

Signed "E. Russell Hopkins, Law Clerk and Parliamentary Counsel."

The Law Clerk: I suggest we call on Mr. Golden.

The Acting Chairman: Honourable senators, is it your wish to hear from Mr. Golden, counsel for the National Farmers Union?

Mr. Aubrey E. Golden, Counsel, National Farmers Union: I have a copy of the act.

Senator Grosart: I would like to have section 144 read into the record.

Mr. Golden: I can read section 144 into the record, and I shall. That is one of the two problems with which Mr. Lesage and I dealt. The other was with regard to the jurisdiction respecting the provincial statutory corporations.

Senator Grosart: I am only concerned with the provisions of the act which make it impossible for this amalgamation to be handled by letters patent.

Mr. Golden: The section with reference to amalgamation is a separate one. Section 144 reads:

144. (1) The Secretary of State may by letters patent under his seal of office grant a charter to any number of persons, not being fewer than three, who apply therefor, constituting the applicants and

any other persons who thereafter become members of the corporation thereby created, a body corporate and politic, without share capital, for the purpose of carrying on in more than one province of Canada without pecuniary gain to its members, objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects.

(2) Nothing in this Part shall be construed to authorize the corporation to issue any note payable to the bearer thereof or any promissory note intended to be circulated as money or as the note of a bank, or to engage in the business of banking or insurance.

That is the end of the section.

The Law Clerk: Section 128A is the amalgamation section. It was also mentioned by the Corporations Branch.

Mr. Golden: That is a long section, running some three pages.

Senator Flynn: Is the idea that we cannot proceed by letters patent, due to the fact that the incorporation is allowed only when persons and not existing corporations? Would that be the argument?

Mr. Golden: No sir. The real problem arises from the fact that we are amalgamating corporations as well as incorporating individuals. The corporations that are being amalgamated are created by statutes of Manitoba and Saskatchewan. The amalgamation provisions of the present federal act only apply to corporations under its jurisdiction. In this case we have asked that the provincial statutory corporations be amalgamated. The bill is conditional upon the assent of the two legislatures involved. The legislature of Manitoba sits today and we understand the bill will proceed rapidly. The bill is already in progress in Saskatchewan.

Senator Hollett: Have we a record of the provinces giving consent?

Mr. Golden: The bill does not come into force until the consent of the respective provinces is given. As a matter of information, that consent has been petitioned for in both cases. We discussed it with the governments involved before proceeding.

Senator Hollett: Can we give our consent without knowing the provinces have given

theirs? Should we act on it at all until they have given their consent?

Senator Haig: To what do they give consent?

The Acting Chairman: It is conditional upon their consent.

The Law Clerk: May I add, to complete the jurisprudence, that we have an important precedent for this type of amalgamation in that of the Canada Permanent and the Toronto General Trust. Canada Permanent was a federal company and Toronto General Trust an Ontario corporation. We amalgamated them by an act of Parliament on the assumption that both jurisdictions gave authority to do so. That is the juridical basis of this legislation.

Senator Hollett: But you did that on the assumption; are we going to do the same thing now?

The Acting Chairman: It is conditional upon the approval of the two legislatures.

Senator Flynn: Where do we find that condition in the bill?

Mr. Golden: Clause 2, subclause (2). There is also machinery contained in the legislation for the inclusion of further corporations when their respective legislatures consent.

Senator Haig: In other words, the provinces of Manitoba and Saskatchewan are going to consent to the operation of this bill?

Senator Aseltine: If they do it becomes law.

Senator Haig: We pass the act first and they consent.

The Acting Chairman: It is conditional upon the two legislatures approving it.

Mr. Golden: Their legislation, I might say, is not conditional but it is predicated upon this act coming into force.

Senator Grosart: Have you any indication from anywhere that the legislatures will comply?

Mr. Golden: Nothing that would bind the legislatures, but the departments involved have indicated to us that they have consulted with the Government and it would be in order for us to proceed with the legislation. We had to petition it because it was private legislation. The original acts were private legislation also. In fact, we were held up a

little by that. We did not want to petition cold, as it were. We requested their opinion and consent first and when we received it, went ahead. We did not get it formally, but they said "please present the bill."

Senator Grosart: So there are no objections from the governments of these provinces?

Mr. Golden: No, none at all.

Senator Grosart: Or the departments?

Mr. Golden: No. If anything, they seemed to be enthusiastic about it.

Senator Grosart: What is the position of the predecessor corporations? Have they themselves voted for this amalgamation?

Mr. Golden: Yes. Each of the predecessor corporations, plus some other organizations which are unincorporated, have agreed to unite to form the National Farmers Union. They have signed agreements which are more or less operational, agreeing to give up their facilities in favour of the national organization and take their members into it. All this has been done, without benefit of counsel, and we are now attempting to put into legal effect something that has been de facto since last August.

Senator Grosart: You say "de facto". Have the members of the corporation voted in favour of this?

Mr. Golden: Yes. There have been conventions in each of the provinces.

Senator Grosart: Could you give detailed information? The reason I ask is that we are setting aside a very important rule, number 95, which requires that bills such as this shall rest for a week, so that anybody who has any objection will have an opportunity. I am not saying this is the position, but I am suggesting, Mr. Chairman, that we should be thoroughly satisfied here that we are not curtailing the rights of anybody who might want to object, by setting aside our own rule. It is a good rule and its purpose is to give everybody an opportunity to know that this matter is coming before this committee at this time and may be reported without the normal lapse of time. I would therefore like to be sure that we have detailed information on each one of these.

Mr. Golden: Yes. I would be pleased to do so.

Senator Aseltine: We have representation here.

Senator Grosart: I would like to have in the record the name of each organization and, if possible, the date on which members endorsed this amalgamation.

Mr. Golden: Mr. Atkinson is here now. He was president of the Saskatchewan Farmers' Union and is president of the new organization. May I ask him to join me. I am sure he would be helpful. It is a question of precise dates?

Senator Grosart: This does not matter. I am perfectly prepared to accept the statement by the witness, naming each one of the predecessor organizations that have assented to this.

Mr. Roy R. Atkinson, President, National Farmers Union: Mr. Chairman, the Farmers Union of British Columbia, by resolution of their annual meeting in 1968, moved to agree to this amalgamation.

The Farmers of Saskatchewan Union, at the convention of December 1968, agreed to this amalgamation.

Also, the Manitoba Farmers Union and the Ontario Farmers Union agreed by resolution at their last convention, September 1969.

The Acting Chairman: What is the date of the Manitoba one?

Mr. Atkinson: December 1968, the same as the Saskatchewan one.

Senator Argue: Some did not agree, but are not mentioned here?

Mr. Atkinson: That is right, but we are not dealing with those corporate bodies.

Senator Hollett: How could you call it a national union, then?

Mr. Atkinson: Because we have membership of it in every province.

Senator Hollett: You have? When you say "we", whom do you mean?

Mr. Atkinson: The National Farmers Union.

Senator Hollett: Why was it called The National Farmers Union?

Mr. Atkinson: Originally The National Union was a federation of provincial farmers unions. Then there was an amendment to the national constitution, which provided for direct membership to the national union.

Those members came out of the Maritime Provinces, which gave us the coverage I described earlier. We discovered from an operational point of view that it was much more advantageous to farmers to amalgamate the various provincial bodies into a national organizations and take membership direct. Hence the decision.

Senator Hollett: In other words, we could look forward to a strike of all the farmers across Canada.

Mr. Atkinson: I hope not.

Senator Hollett: We had better get our own gardens ready.

Senator Argue: What is the position of the Farmers Union of Alberta?

Mr. Atkinson: That union, at a meeting in December, moved to amalgamate in Alberta as a provincial organization, in other words, moved to consolidate what they called the unified farmer organizations in Alberta.

Senator Argue: They are part of this incorporation?

Mr. Atkinson: No, they are not. However, I would want to say that we are chartering locals in Alberta just as fast as we can accommodate them. I myself attended the chartering of five locals two weeks ago, and I have about thirty more in the next four weeks.

Senator Argue: And they are affiliated to the national organization the same as other locals?

Mr. Atkinson: That is correct.

Senator Grosart: Was there any dissent at any of those meetings?

Mr. Atkinson: Not very much, I would think. As a matter of fact, I cannot recall any really strong opposition at all from any of them.

Senator Argue: Except in Alberta. It was turned down?

Mr. Atkinson: In Alberta that was the position.

Senator Grosart: Let the witness answer. Did any of these predecessor organizations actually vote against?

Mr. Atkinson: None of the ones named in the bill.

Senator Grosart: None of those described as predecessor corporations?

Mr. Atkinson: All of those, by resolution, by delegate bodies in annual convention, voted to amalgamate.

Mr. Golden: As I understood the question, it was, did any member of the predecessor provincial corporations vote against the resolution?

Senator Grosart: That is right.

Mr. Golden: I imagine there must have been some.

Mr. Atkinson: In Saskatchewan, none voted in opposition. As I recall, in British Columbia, none. Mr. Langdon may be able to refresh my memory on Ontario. Was there any opposition in Ontario?

Mr. William Langdon (Director, National Farmers Union): I do not think so. There was a discussion as to date. There was not anything that was serious.

Mr. Atkinson: You attended, did you?

Mr. Langdon: I attended at Manitoba.

Mr. Atkinson: And what was the position there?

Mr. Langdon: I do not recall the exact vote. Some delegates attended the Manitoba convention in 1968 who I felt would not approve, because of the type of questions coming forward. When the vote came, I would not want to say if any voted against or did not vote against. If there was any voting against, it was extremely few.

Senator Grosart: I realize that one of our functions here is to protect any such minority. What notice has been given of this?

Mr. Atkinson: To the members?

Senator Grosart: Yes.

Mr. Atkinson: They have all been notified, either by direct notice or written, individually, to our membership, or to the press, through our own paper, that this change is taking place. This information is flowing to them since those conventions, the beginning of 1968.

Senator Grosart: Would you say that every member of predecessor organizations have been notified in writing?

Mr. Atkinson: I would say so, yes, but I would say in writing or through the press, through our own publication.

Senator Grosart: What about the formal notice? Has this been advertised?

Mr. Golden: Yes, on the advice of the legislative counsel, advertising has been taken in the *Gazette*. I realize that the *Gazette* does not probably go to every member, but it was thought that, because of the national character of the organization there was no particular newspaper appropriate, as opposed to any other, and the advertisement did appear in the *Canada Gazette*.

In that connection, I should point out that there might be some confusion as to the difference between amalgamation—the amalgamation which the Senate is being asked to deal with today, and what I call *de facto* amalgamation which took place as a result of these conventions over a year ago.

That getting together, the formation of a national farmers union, the transition between the federation and a direct membership federation, was widely known. It was widely debated and discussed. It was not exactly the object of controversy. The wording was not the object of controversy. But it was done in a highly publicized kind of atmosphere, including this convention and the press reports coming out of this. Prior to that, the local unions which maintained them and in which they participated very actively—it almost took on the aspect of an organizational campaign. If I may be permitted—not being a member but looking at it from the outside—it was a fairly active kind of thing, the campaign for it. That is, on the question of notice. So that the question of notice really relates more to what happened earlier when it was determined to form a national direct-membership organization. I might say that much of what is happening now is more lawyers' business. I was consulted with a view to obtaining the legal perfection what had already been done on the ground, as it were, and this required going back on what had been done previously and also required this legislation in the opinion of the department.

Senator Grosart: But the point is, whether any minority dissenting rights might be jeopardized. I am not interested in the *de facto* organization. I am interested in what this Senate does or may do to the rights of somebody who might dissent, because we are in a position where somebody might say "I wanted

to belong to a provincial organization but not of necessity to a national organization." Do not our rules require notice by advertisement in certain newspapers?

The Law Clerk: That was a matter for the committee's branch and I always leave it to the committee's branch and they in turn consider each case on its merits. Of course they have specified rules which they follow.

Senator Grosart: What are our rules in this case and have they been followed? I do not want to give the impression I am critical or in any way opposed to this, but I would like to know what the situation is.

The Law Clerk: Perhaps it might be desirable to have Mr. Hinds come in.

Senator Grosart: We should have it on the record that notice has been given as required by the Rules of the Senate. I say this because I would not like to think we were setting aside a rule that was for the protection of somebody.

The Acting Chairman: In the meantime, Mr. Hopkins, have any objections been received?

The Law Clerk: No objections have been received.

Senator Grosart: I appreciate that, but in my view in this kind of situation we should have evidence from the Committees Branch that the requirements so far as notice is concerned have been met.

Senator McDonald: Mr. Atkinson, you mentioned that the membership had been notified by letter or through the newspaper. Do you now have a National Farmers Union newspaper?

Mr. Atkinson: Yes.

Senator McDonald: Then so far as your mailing list is concerned, have you members who are also members of provincial organizations?

Mr. Atkinson: Yes.

Senator McDonald: Does that include all the ex-members of, say, the Saskatchewan Farmers Union?

Mr. Atkinson: Every member who has taken a membership directly in the National Farmers Union or who held a membership in a provincial farmers union and that means every member of the amalgamating groups. I

should also report to you that this question was dealt with by constitutional amendment at the conventions, and our procedure is that all constitutional amendments have to be in the hands of the locals 30 days before the convention, at which times these matters are discussed within the locals. This again is to protect the interests of the members so that they are aware of the changes taking place in the organization and if they are opposed to changes they have an opportunity to express their opinion.

Mr. Golden: I am also on that mailing list and I notice that there was adequate publicity given to this bill and the fact that it was being proceeded with.

Senator McDonald: But the fact that you picked up the mailing lists of the provincial organizations and send the paper to them would mean that every member of the provincial union and every member of the national union would have received this.

The Acting Chairman: Mr. Hinds is here now.

Mr. Grosart: Mr. Hinds, I was asking for verification that the notice required by our rules had been given.

Mr. J. Hinds, Assistant Chief, Committees Branch: Yes, the rule requires advertising once a week for four consecutive weeks in the *Canada Gazette*. That was done starting on December 13, 1969, and continuing for three consecutive weeks thereafter.

Senator Grosart: Why is this situation different from that which requires advertising in certain daily newspapers?

Mr. Hinds: It depends on the type of organization. For an organization of this kind, the *Canada Gazette* only is required.

Senator Grosart: What is the distinction in this case?

Mr. Hinds: Rule 86 says:

(1) Every application to Parliament for a private bill shall be advertised by notice published in the *Canada Gazette*. Such notice shall clearly and distinctly state the nature and objects of the application, and shall be signed by or on behalf of the applicants, with the address of the party signing the same; and when the application is for an act of incorporation the name of the proposed company shall be stated in the notice.

(2) In addition to the notice in the *Canada Gazette* aforesaid, a similar notice shall be given in a leading news publication with substantial circulation in the area concerned and in the official gazette of the province concerned,

(a) where the application is for an act (i) to incorporate a company or to amend an act respecting a company whose objects relate to transportation and communications generally, including airlines, pipelines, telecommunications, railways, or canals, or whose objects relate to the construction of any works;

(ii) to obtain any exclusive rights or privileges; or

(iii) to extend the powers of a company or to increase or reduce the capital stock, or to alter bonding or other borrowing powers, or to make any amendments which would in any way affect the rights or interests of the shareholders or bondholders or creditors of the company;

This application is not seeking any exclusive rights or privileges and therefore the *Canada Gazette* would appear to be sufficient.

Senator Grosart: Probably the distinction is also that there are no shareholders or bondholders.

The Law Clerk: And no construction. They have in mind nothing that is for the advantage of Canada which might extend the jurisdiction of the provinces.

Senator Grosart: Is there any transfer of funds involved in this?

Mr. Atkinson: There will be a transfer of assets from provincial unions to the national union and also there will be the assuming of liabilities.

Senator Grosart: How much will be involved, roughly?

Mr. Golden: It does not look like a plus figure at the moment.

Mr. Atkinson: I would think somewhere in the order of \$250,000.

Senator Grosart: You are speaking now of your predecessor organization.

The Law Clerk: It comes under subsection (4) of section 2.

Senator Grosart: I was asking about the total amount.

Senator Hollett: Is the word "farmer" defined anywhere in this?

Mr. Golden: No, it is not.

Senator Hollett: Of course I know what a farmer is, but I know a number of people who call themselves farmers and who have never turned a sod in their lives.

Mr. Golden: The Income Tax Act defines that quite clearly.

Senator Belisle: In this Federation, every provincial organization will be able to join?

The Law Clerk: There is an enabling provision to that effect which is section 2, subsection (3).

Senator Grosart: How will this organization relate to existing national farmers' organizations?

Mr. Atkinson: It will be separate and apart. At least, it will be an independent corporate entity, if you will.

Senator Grosart: How will it be distinguished from the Canadian Federation of Agriculture?

Mr. Atkinson: The Canadian Federation of Agriculture is a federation of organizations, whereas this organization will be an organization of farmers. In other words, it will be a single organization whereas the Federation represents many organizations.

Senator Grosart: That is why you call it a union?

Mr. Atkinson: Yes. The old national federation was a federation of unions and the experience we had in that field led us to the conclusion that it was important to give farmers a forum through which they could work which was national in nature.

Senator Grosart: How will the will of the members be expressed in relation to executive action?

Mr. Atkinson: The process is as follows: members will meet and make decisions through their locals which will be referred to regional conferences or national conventions in which the members' will will be resolved. The decisions which come out of those conventions will then be the guidelines through which the organization will operate. These will be the parameters of the policy of the board of directors.

Senator Grosart: Would this not be the same as the Federation of Agriculture?

Mr. Atkinson: It would be somewhat different. The Canadian Federation of Agriculture is divided into groups who make decisions at the organizational level.

Senator Grosart: But endorsed by their members in the same way as yours?

Mr. Atkinson: Endorsed by their members to the organizational plateau. Once they move past the organizational plateau it is a meeting of resolutions from the various organizations across the country. Then there is an organizational trade-off in terms of decisions made.

Senator Grosart: Is yours not the same? You say you have local regions.

Mr. Atkinson: It is different in this sense, that their process is through a delegation of delegates to various levels. Ours is direct from the farm community to the decision-making body, which is a national convention.

Mr. Golden: There is a basic structural difference. I am not very familiar with the actual underground workings of the two organizations, but the Canadian Federation of Agriculture is a body made up not only of actual farm organizations, but of other organizations in the farming field. It is a broader type of organization. When Mr. Atkinson referred to a trade-off he really meant different interests can appear at the Canadian Federation of Agriculture, whereas in the Farmers Union there would be no room, for instance, for elevator companies.

Senator McDonald: Is the Canadian Federation of Agriculture not a federation of wholesale and retail concerns and not of producers?

Mr. Atkinson: I would call it a conglomerate in which the wholesale and retail handling concerns and farmers meet and trade off policy decisions.

Senator Argue: Would you not consider that the Canadian Federation of Agriculture is an organization of business groups, albeit farmers' business groups, but wheat pool, co-op creameries, co-op implements, and so on? I may be wrong, but my impression at any rate is that it is an organization of farmers' business groups.

Mr. Atkinson: We term them agri-business groups. It is farm and business.

Senator Argue: It is not individual farmers in individual organizations.

Mr. Atkinson: I could best describe it by saying that farmers do not take a direct membership in the Canadian Federation of Agriculture, but in other organizations who first of all federate into federated bodies at the provincial level. Then the provincial super-body federates with the Canadian Federation of Agriculture. It is a much different process than that in which we are involved.

Senator Grosart: Would your members be members of the local and, only by virtue of their membership in the local, members of the union?

Mr. Golden: By virtue of the fact that they are members in the national they are members of the local. The local is the administrative organization at the community level through which farmers discuss mutual problems.

Senator Grosart: Where do they pay their fees?

Mr. Golden: To the national.

Senator Grosart: They send their money to Winnipeg?

Mr. Golden: That is correct.

Mr. Atkinson: The national pays back to the district a percentage of the national fee. Districts then make a determination—the district is made up of locals—they determine as to what amount is paid back to the local.

Senator Grosart: What is your anticipated annual revenue?

Mr. Atkinson: We have projected for the first year's operation a minimum budget of \$750,000, with a maximum of about \$1,200,000.

Senator Grosart: What would the membership fee be?

Mr. Atkinson: \$25.

Senator Grosart: How many members do you anticipate in your first year?

Mr. Atkinson: I would suppose about 30,000. That is a minimum.

Senator Grosart: What percentage of the active farmers of Canada are in it?

Mr. Atkinson: This again becomes a question of definition, because the definition of "farmer" in Canada also includes people who live in the country and have a bit of a hobby

in market farm produce, and there are some rural residents who have off-farm jobs.

Senator Hollett: Do you not think the definition should be in the bill?

The Law Clerk: No, senator. It is provided in the bill that the union may make regulations concerning qualifications of eligibility for membership or elected office. So they will make the provisions.

Senator Hollett: That is all right—as long as it has been mentioned.

Senator Grosart: That in itself is a very dangerous thing. Senator Hollett's point is a good one. This means that you can decide who is eligible—and that you yourself could be eligible for membership—which is not a good thing in an organization calling itself a national farmers union. It would be valuable to have a provision—and I recommend this to you for your by-laws—to indicate some free access of eligibility to your organization. It would be good public relations, if I might say so.

Mr. Golden: I may say that any definition in the bill would restrict it, because at the point it is at now, anyone, even those persons mentioned who have merely a garden in the back of the house, are technically eligible for membership of this organization. I would not think it is in Mr. Atkinson's objective to rule out such dues-paying members, any more than is absolutely necessary. There is an economic force at work there and it is a matter of organization. I do not know what kind of definition the farmers would put in. I am afraid of the income tax definition, it might be too restrictive.

Senator Grosart: It is a problem in any organization set up as a union to define the eligibility of persons, because there have been cases where this has shut out people, not only from membership in it but from jobs.

Mr. Golden: I may say this as an aside on this topic. We hit a problem because of my rather egotistical assumption that my French was good enough to do a translation of "National Farmers Union". I did that myself and came up with the word "fermière" instead of "cultivateur". And the word "fermière" implies a less established sort of farmer, more than the tenant farmer kind of indication. And we from the history of Canada think of "cultivateur", which indicates a farmer of some more means, with more established assets. That may be a definition by accident.

Senator Argue: I have a question on clause 4. It provides for the establishment of the head office in Winnipeg—which was no doubt a decision of the National Farmers Union. I am curious as to why Winnipeg was chosen. I am curious as to why Ottawa was not chosen as a spot for the head office of the National Farmers Union, since I take it that a good deal of the work of the union is in fact in keeping in touch with members of Parliament, including Senators, and with the federal Government, etc. When are you going to move to Ottawa?

Mr. Atkinson: Do you need a little company, Senator Argue?

Senator Argue: It is lonesome around here, with all these lawyers.

Mr. Atkinson: I suppose there were many reasons why the head office was in Winnipeg. It is sort of the centre of the country. There is access to an international airport. Communications are accessible. I suppose that is a major thing. It could well be that there is going to be a lot of commodity activity out of Winnipeg.

Senator Haig: It is a good centre to work in, too.

Senator Argue: This might have to do with policy and might not really be germane to the legal questions of this bill, but I would be interested as to whether or not you might be considering setting up some kind of office in the City of Ottawa, as I believe your predecessor organization had at once time in a very limited way. From my experience, it would be a very valuable thing.

Mr. Atkinson: I would think that is an obvious outgrowth of the organization, to have contact in Ottawa.

Senator Argue: I think that if you are going to have lobbying here, and these are lobbying situations in Ottawa, it would be pretty difficult to carry out an effective one from Winnipeg, or one as effective as you might carry on if some of the officers of the National Farmers Union were here on a fairly regular basis.

Mr. Atkinson: There was a feeling expressed by many of our people that it was probably just as well to sort of stay outside of Ottawa because when you get into Ottawa you get so close to the machinery that you have a different perspective on things than

you have if you are sitting outside and looking in.

Senator Belisle: The decision on Winnipeg was not arrived at with any thought of future separatism?

Mr. Atkinson: No. As a matter of fact, Senator Grosart, if we were thinking in those terms, we probably would not be in an organization called the National Farmers Union.

Some hon. Senators: Hear, hear.

Senator Grosart: I would like to ask the witness if he would object to an amendment in clause 6. I suggest the deletion of the words "it deems" in line 3 and the substitution therefore of the word "are", so that instead of reading that the union may from time to time make such rules and regulations not contrary to law as it deems necessary to carry out its work, it would read that they may make such as "are necessary".

The reason I suggest this amendment is that at the moment I am trying to get the draftsmen of other bills giving certain powers to the Governor in Council, to make the same change.

We used to have the wording in acts that "the Governor in Council has the authority to make regulations necessary for the implementation of the provisions of this act." In recent years somebody changed this to read, "as the minister deems necessary," which takes the whole act, on the aspect of the regulations, out of the courts entirely. I do not think this Parliament should pass a bill saying that you may do anything that the executive thinks necessary. I think it should be "that are necessary," because if someone objects to what you are doing the reply can be made that it says "what is deemed necessary".

The Acting Chairman: It makes it mandatory.

Senator Grosart: It brings any action of the executive under the provisions of the act and not under the judgment of the executive.

Mr. Golden: Mr. Hopkins and I have worked out some of the wording, and I would want to consult with him about this. I have no objection to the principle of the wording. However, I would suggest that there is a growing body of administrative law that says in effect that there are areas of administrative discretion in an organization. This has mostly to do with administrative tribunals,

however, and this is not an administrative tribunal. If that were to be applied to this organization, there would have to be a change. As it now stands, if the organization were acting in bad faith or denying the legitimate interest of a substantial group of persons in an arbitrary way, they would be able to have it reviewed by the Courts. If the words are changed as you have suggested, then it would mean taking the administrative law and applying it to this body or the Board of Directors, which would mean it would be subject to review in the courts so far as every by-law was concerned on the issue as to whether or not it complied with the act.

Senator Grosart: And what is wrong with that?

Mr. Golden: There is nothing wrong with it, but the tendency in administrative law is to create an area of administrative competence.

Senator Grosart: And administrative irresponsibility is a very bad trend.

Mr. Golden: I only cite this because this appears to be Government policy—to create areas of administrative responsibility. Therefore, to change the language in this way would go against the general trend and could create endless litigation. The results would be not any different. If the courts were to determine that somebody had been arbitrarily dealt with under an abuse of that clause, they could still interfere, but if it was not an abuse and was simply a question of interpreting the statute, and with one issue being raised after the other, having regard to the multitude of by-laws, there is liable to be an endless review. I have had some very hard-nosed debates with people in both the federal and provincial governments about this tendency. I am acting for an organization that has this option facing it at the moment.

Senator Grosart: I cannot agree with you at all on this. You say you do not want to be faced with endless litigation, but surely the whole purpose of litigation is to protect rights that might otherwise be in jeopardy. To me that is an extraordinary statement to use—"endless litigation."

Mr. Golden: It is the standard language.

Senator Grosart: It is not standard at all. It is used here and in some of the newer acts, but there are many, many statutes that do not use this language. I speak strongly on this

because I feel strongly about it. You could have a situation arising where a minister or the executive of any body could say "the act says we can do this if we deem it to be necessary, and this is in accordance with the provisions of the act." Surely a court should decide whether they are *intra vires* of their own act.

Senator Hollett: Why not say this: The union may, from time to time, make such by-laws, rules and regulations, not contrary to law, as may be necessary.

The Law Clerk: I would like to make this observation because it is my duty as I conceive it, to limit myself to a legal basis and not to go into the realms of policy, and in my view either form of wording would do the trick.

Senator Grosart: What trick?

The Law Clerk: Either wording would be legal.

Senator Grosart: It would be legal of course, but anything that is passed by Parliament is legal.

The Law Clerk: Yes, but this whole question will shortly be reviewed by the Senate, and probably by this committee if the motion concerning statutory instruments standing in the name of Mr. Martin carries. For a number of years now we have had very few private bills. This is the standard form for these private bills but it is a matter for the committee to say whether there is to be a change in that language, and, as I say, the whole subject will shortly be under a general review. However, whether we should make such a decision here and now is not for me to say.

Senator Grosart: I am going to move that clause 6(1) be amended and that the words "it deems" in line three be deleted and the word "are" substituted therefore. I realize that this is not the proper form of amendment, but if the chairman will take the revised clause 6(1) as read, then that is my motion.

I would urge this on all honourable senators. This is a good place to make a start. The fact that this whole question will come before the Senate and probably before this committee is not really relevant to my point, because that discussion will refer only to ministerial power and authority under orders in council. I cannot for one minute accept the proposition

that even if that is desirable in a public statute it is therefore desirable in a private bill.

I think the principle of accountability to the terms of the statute by the courts is essential. I cannot fully agree with Mr. Golden's contention, although I know what he is speaking of, that the courts have the authority to go beyond the wording of the statute. The executive could quite properly come into court and say, "The statute says that if we deem it necessary we have the power to do such and such a thing." The court might decide whether it is the right or wrong thing to do, but I suggest, the court would not say, "You don't have the power to do it." They might say, "You have exercised your power in a wrong way". What I am saying is that you should not have the power to go beyond what is necessary to implement the provisions of the statute.

Senator Hollett: Would not the words "not contrary to law" take care of the situation?

Senator Grosart: No, not at all. There must be some reason for its being there. It seems rather redundant to me, because I cannot see where any act of Parliament can give power to something that is contrary to law. I am concerned about something that might be quite legal under the terms of this act. Let us take an example. Let us assume you decided to raise your fees without consulting your members...

Mr. Atkinson: We cannot do it. Our by-laws outline the procedure under which these may be raised. It is a voluntary organization and therefore a member who chooses to do so can opt out.

Senator Grosart: That is a very poor answer. You are talking like a capitalist who says "If you don't want to buy my goods at the price I am asking, you don't have to buy them at all." The point I am making is that the individual may want to stay in to make sure that you stay within the law.

Mr. Atkinson: But he has the right to do that because in order to adjust the fees the membership must do so at an annual convention. That is a democratic decision that is made.

Senator Grosart: Well, I may have taken a bad example in that one, but obviously there are things that the executive might do, and they could say "We deem these things to be necessary" and if somebody at an annual general meeting were to say, "I do not think that

that is necessary" then they could say, "I am sorry, but just read the act. It says 'we deem it necessary'", and that would be the end of it.

Mr. Golden: The problem really in the context of this legislation is considerably narrower than that. I realize your concern, and I am very deeply aware of it and I have been debating it for some time. In this case it has to do with the by-law-making power out of which flow the rules and regulations related to the by-laws. Now certain by-laws may be enacted for a specific purpose and the area of judicial concern creates a difference. The courts have said on many occasions, and here I am summarizing the language of many different decisions, that they do not want to sit as a court of appeal from every body who makes decisions and some of them have considerably more power than we find here. After all, you can resign from the National Farmers Union, but you cannot resign from a body such as the Commodities Board in Ontario. Many cases have come from these commodity boards where they have been given the power to determine what is in the best interests of the marketing of a particular commodity. If they decide it is in the best interests for marketing to send one of their members to Palm Beach, then that is an area that the court will not interfere with. If, however, they had done it in bad faith in denial of natural justice, a matter which deprives persons of the right to operate under the Constitution and to deal with their executive in the normal way, the courts will interfere. They do not want statutory power to be used in an arbitrary and unfair way, but to enter into the realm of policies of the organization.

It is not a mandatory corporation. The membership is not mandatory but falls in line with the area of private associations. In that area the courts will be extremely reluctant to interfere. They would be equally reluctant under the other language, so I am not taking any great stand on it, except to point out that the one area invites the courts to deal with policy and the other does not. The policy area is what the courts are invited to deal with, but they do not wish to do so.

Senator Grosart: I do not care how reluctant the courts are. If somebody says this body is *ultra vires* the act the court has no option. That is what they are there for. If a citizen appears before the court and says this organization to which I pay dues is acting

outside the provisions of the act, the court will hear that person.

The second comment I have with reference to your remarks is that you are, of course, dealing with administrative law, where the statute has delegated authority, which is a different thing from this. You are saying you have delegated authority, *ipso facto* you are given the policy powers because for various reasons it is not possible to exercise the policy-making powers by statute.

Mr. Golden: There is none of that.

Mr. Grosart: There is none of that here at all; this is an entirely different situation. My amendment will require any action of the officers of the union to keep its by-laws, rules and regulations within the provisions of the act, not within what they think are the provisions of the act. This is all my amendment would do.

Senator Bélisle: Mr. Chairman, I am very much in sympathy with what Senator Grosart says. I know it makes good hay, if I could use the word, but I feel, as Mr. Hopkins said, that we are going to be more careful with our legal phraseology. I do not feel that we should start with the farmers in this instance. So, unfortunately, I will not support my honourable colleague, Senator Grosart. I feel that we have been using this kind of phraseology, or this legal terminology, and we should let one more go.

Senator Grosart: That is the worst possible argument in the world, Mr. Chairman, that we have been doing the wrong thing and therefore should keep on doing it. We are a committee of the Senate charged with the responsibility of examining a specific piece of legislation. Our responsibility is to make this legislation as good as it can be, particularly in the interests of the members of this organization upon whom by statute we are imposing obligations. This is a very good place to start.

Senator Hollett: In clause 6, subclause (1) it is stated:

The Union may from time to time, make such by-laws, rules and regulations,...

Who is the Union? How are you going to get the Union to do it?

Mr. Golden: In the first instance the directors will have the power.

Senator Hollett: Under what?

The Law Clerk: Clause 6, subclause (2).

Mr. Golden: Clause 6, subclause (2) provides that the incorporating directors in the first instance would have the power to enact the first set of by-laws. The persons named in the first sections of the act, specifically listed, would be the first directors.

Senator Hollett: Why?

The Law Clerk: All the people named in the bill are stated to be the first directors.

Mr. Golden: I may say that they are in fact the directors now.

Senator Hollett: I am thinking about the new by-laws which may have to be made and the union is going to do it. It is going to take a long time for the union to get a little by-law passed if they have to go all across Canada for the consent of every branch. I do not see why the directors of the union could not make the by-laws.

Mr. Golden: The directors shall make the first set of by-laws. The general power in clause 6 is a continuing power of the union to make by-laws. The first by-laws will set out the procedure, probably by convention and decision.

Senator Grosart: This greatly reinforces my argument, because now we are in a position where non-elected directors will make the substantive by-laws. They have not been elected, and I suggest it is reasonable to say that the act requires them to stay within the provisions of the act in making those by-laws.

Mr. Golden: In fact these persons are all directors by election of the unincorporated association.

Senator Grosart: Yes, but they are not of the subject of the bill.

Mr. Golden: Yes, but in so far as it was humanly possible to elect them prior to the bill being passed...

Senator Grosart: I do not object to saying that they are not elected officers. Therefore there is nothing unreasonable in requiring them to stay within the provisions of the act.

Senator Haig: Clause 7, paragraph (d). Why did you not put in there the funds to be invested in trustee securities?

Senator Grosart: Mr. Chairman, I wonder if we should not stay with the amendment?

The Acting Chairman: Yes; we are into another clause of the bill. We were on clause 6 and Mr. Grosart's amendment relates to that. Are there any other senators who wish to comment on clause 6 and the amendment proposed by Senator Grosart?

Senator Argue: I can be and am sympathetic with the general line taken by Senator Grosart, but it seems to me that this committee should be very careful at this stage not to single out one farm organization, or one organization for one kind of treatment and one kind of law if all the other organizations being incorporated have this looser phrase within their act. My question may have been answered, but I did not hear it: To what extent is the type of wordage in the bill before the amendment common and to what extent is legislation with words like the amendment? In other words, what is the practice? Is it nearly all one way or nearly all some other way?

The Law Clerk: We are in the invidious position that we rarely deal with such bills. It is only for the last five years, since the amendments to the Canada Corporations Act. Prior to that we dealt with them in the regular course. This was the language commonly used.

Senator Grosart: With due respect I suggest that this is not by any means a usual phrase in private bills—it is certainly not universal.

The Law Clerk: Well, that is a question of fact, senator.

Senator Grosart: I say that, with respect.

Senator Argue: I am not looking to see whether there was one exception or not, but I want to know in general where the majority lies, or the vast majority lies.

The Law Clerk: I would say that many of them read this way.

Senator Belisle: This is the observation I gathered a while ago.

The Law Clerk: I do not take issue with Senator Grosart at all, because it could be changed.

Senator Argue: It may be that it should be changed.

The Law Clerk: It may be that it should be changed. That is not an area in which I feel I should intervene.

Senator Argue: This may be a very stupid question. I am a layman. Under this new system, providing a law for incorporation, what kind of words are used? Has your corporations branch seen this? They produce laws setting up corporations, but in another area. What words did they use?

The Law Clerk: I can tell you this, this is as far as I can go, that this bill in its full text was submitted to the corporations branch, and they suggested certain changes, and they did not suggest that one. But that does not prove very much.

Senator Grosart: It proves nothing.

Senator McDonald: On this point, it was mentioned earlier that Senator Martin has a motion now before the Senate dealing with statutory instruments. It seems to me, that despite the argument put forward by Senator Grosart that this may restrict ministerial power, probably the intent and purpose of the review of statutory instruments is for that purpose. It seems to me that the committee which studies the proposals will be lending its attention to private bills and their working with respect to delegated powers. I think we might act wisely by leaving it in this bill, until such time as this committee has had the opportunity to review delegated powers, whether they are ministerial powers or are in private legislation. Because if we are going to change the wording in this bill and make it more restrictive, then perhaps we should change the wording in all the acts.

Senator Grosart: That is what King John said at Runnymede—"We have always done it this way, why are you insisting on a change?"

Senator McDonald: I am not saying this is of necessity the right way, but when I see that there is a general review pending, I think it would be wise to wait until that general review has been done.

Senator Grosart: There is no general review pending on this at all.

The Acting Chairman: Are you ready for the question?

Senator Argue: I think this is really important. If the farmers union do not think it is important, then I am prepared to drop it right now.

The Acting Chairman: You make your point.

Senator Argue: If they feel they do not want to accept the suggested amendment, I would ask for a little further clarification. The National Farmers Union, as I see it, is a controversial organization. It has some very firm views on many things. A lot of people do not agree with the farmers union itself, and there are some things where some are for the farmers union and some are against it. On the question of feeding the Metis, some people think it great, others think that they have no business trying to do something like that. So it is controversial.

I think that as far as the resources are concerned, it is relatively poor organization, in the sense that the resources are limited. I would be highly surprised if the farmers union had funds to fight a series of court cases based on what we are asking this morning, if there should be an appeal from that. I do not know if it is possible. The legal counsel is here for the farmers union.

We should be very careful not to single out at this moment one corporation, one organization, for one kind of treatment, and let everybody else have some other kind of treatment, particularly if there is any danger whatsoever, that people who are opposed to the objectives of the farmers union could, by some means, use this kind of wording to see that a number of court cases were brought forward...

Senator Grosart: Mr. Chairman, that is surely...

Senator Argue: I would like to finish my statement. I would like to know from the farmers union whether or not they feel there is a danger in this amendment. If they are quite happy with the amendment, I am quite happy to accept it, in this situation. But if they feel there is danger that might flow from using them as a starting point for some other language, then I think we should vote against the amendment.

The Acting Chairman: Mr. Golden, what do you say?

Mr. Golden: First of all, the bill was drafted without any specific concern with this particular clause. This was actually taken from a precedent. I was trying to locate it in my file but I could not do so. There were a number of precedents on various aspects of this bill which were used and put together in lawyer-like fashion, as we do not always do things originally. This was not one of the things

dreamed up originally in my office, and also it was not brought in specifically.

I also want to say—and I am quite certain that I am speaking for the organization—that we do not want to appear in any way as wishing to hold an arbitrary kind of power or appear to wish to do anything unfair to persons which would result in a court action.

I think we are aware, from Senator Grosart's remarks, that the purpose of the amendment would be to open the by-law, to make the door more open than it is now. It is already open to some extent, but this would open it to the court to review it. I would indicate the kind of legal debate that is going on in court circles on this question. I am not always exactly in agreement, but I am an active participant. I think my position would be that it would tend to create legislation that might be used to hamper organizations.

I do not suggest that it is the intention. If this is widely reported, it might give people some ideas. I do not know.

Certainly, I do not think it is.

If it is the common practice of the Senate, that is the way it came before the Senate, because I drew it from the common practice. I would assure you, on the technical point that I have to make, that we do not want to ask for arbitrary power, but we would also not wish to open the door in such a way that we could be made a kind of legal whipping post.

Senator Argue: So you are for it and against it?

Mr. Golden: On behalf of the organization, I can say we would prefer the bill to go on as originally drafted on that clause, but I do not think I should express any views on the policy question.

Senator Argue: No. The Senate will deal with the policy question.

Senator Aseltine: Is it your opinion that if the amendment were passed, that it would be possible for persons not in sympathy with the union, and outside the union, to have asked the union by legal means, by trying to make it show cause, other than is necessary.

Mr. Golden: I think it would provide a kind of legal argument. It is not easy to define. These things are not final, because they are always open to review. If a board that is elected is elected democratically, as it will be,

and if that action is subject to democratic review, that is, I think, the appropriate vehicle for policy determination.

As I said before, the courts may be very reluctant to get into policy questions; but they can always be asked to do so; and by the time the Supreme Court of Canada has said it is reluctant to entertain this question, two years and a great deal of money will have gone down the drain.

Senator Haig: Are you not going to deal with this question?

The Acting Chairman: Yes.

Senator Grosart: For the record, if I may make one statement, and I am not concerned with policy, the purpose of my amendment is really to require that the actions of the executive be within the provisions of the act.

The Acting Chairman: It is moved by Senator Grosart that the words "it deems" in line 3 of clause 6 be struck out and the word "are" substituted therefor. That is the motion. All those in favour of the motion please signify by saying "Aye" or raising the right hand.

Vote counted: 3 for, 3 against.

The Law Clerk: The Chairman has a vote, but not a casting vote. In this case, if he votes, it would appear to be in effect the deciding vote.

Senator Grosart: But the Chairman did not vote and therefore it is a tie.

The Law Clerk: And where there is a tie, the matter is resolved in the negative.

Senator Grosart: That is right.

The Acting Chairman: Well, the motion is lost then. I thought I could vote only in case of a tie.

Senator Hollett: You did not say how you would vote.

The Acting Chairman: I did not have to.

The Law Clerk: A tie vote is lost.

Senator Hollett: It does not have to be lost. He could vote for it.

Senator Haig: In clause 7 (d) dealing with investment powers, why do you not put in a restriction that monies may only be invested in trust certificates?

Mr. Golden: There is a provision in clause 8 covering investment of funds which are in the nature of trust contributions to the union. These are things in the nature of donations being held under similar trust powers.

Senator Haig: But under clause 7 (a) if you have any funds left over after your fees are paid at certain times of the year you can invest it in anything you want to.

Mr. Golden: It is not intended that the function of this organization shall be to retain large sums and these sums would be considered to be in the nature of operating funds.

Senator Haig: But at certain times of the year you might have large sums of money on hand and you could invest them in 90-day certificates of banks or trust companies or you can put them into long-term mortgages if you like. I think in a situation where there are no dividends to be paid, you should have some restriction.

Mr. Golden: There are certain provisions covering certain types of funds that might be appropriately kept under that kind of provision, but in the nature of an organization like this there is a lot of money on hand, as it were. At least we hope there will be a lot of money on hand. But whatever operating funds there might be available would not be invested at all. It would simply be kept in a bank account—which I suppose is a form of investment—or put into some short-term investment whereby they would be readily available. The kind of fund going into long-term securities or what is commonly referred to as trustee investment would be money that it was intended to keep for a while and would be invested as retained capital. It is not anticipated that this organization will have any of that. If it could be provided for in an amendment, I would prefer to see it as a separate fund established under the act to be used for that purpose. If it is the wish of the Senate that certain funds be invested in trustee investments, that portion would have to be invested in a separate fund, otherwise it could be interpreted that money given to an organizer in an area to set up the organization there—it might be argued that the money was not a trustee investment.

Senator Macdonald: Surely if it is their money we can let them do what they want with it.

The Law Clerk: Again, this is by no means a conclusive observation at all but this stand-

ard form has in practice been required only in the case of trust property.

Senator Haig: But in clause 8 you have restrictions on investment.

Mr. Golden: But these are funds given to us as endowments and donations and that kind of thing. Sometimes people might say "I would like to will you something from my estate" and this would take care of that situation. But all those funds not received as dues or fees could be invested in trust investments.

Senator Hollett: Put it in the wheat pool.

Mr. Golden: I suppose we could transfer surplus funds into clause 8 funds. However, the history of the organization is such that no such funds have been available.

Senator Haig: The history of some organizations that I belong to has been that at certain times of the year when the members have paid their fees they have surplus funds which they invested in bank certificates or as a trust investment. Is your organization going to have surplus funds on hand at any given time of the year?

Mr. Atkinson: That is rather difficult to know.

Senator Haig: When does your membership pay their fees?

Mr. Atkinson: It is a continuous thing. It circulates throughout the whole year.

Senator Haig: In other words, you could have a member paying his fees from July 1st of one year to July 1st of the following year.

Mr. Atkinson: That is right.

Senator Belisle: Am I in order in suggesting that the bill be reported as it is but, if it is at all possible, within the terms of reference to report it to the Senate that we have accepted the bill as it is after defeating a motion for amendment and to make it clear that the executive, to use the legal terminology should be very careful, because we are not going to go for this any more.

The Chairman: Shall we report the bill without amendment?

Hon. Senators: Agreed.

The committee adjourned.



Second Session—Twenty-eighth Parliament
1969-70

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 2

WEDNESDAY, MARCH 18th, 1970

First Proceedings on Bill C-136,

intituled:

"An Act respecting the expropriation of land".

WITNESS:

Dept. of Justice: Mr. C. R. O. Munro, Assistant Deputy Attorney General.

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*.

Argue	Flynn (<i>ex officio</i>)	McGrand
Aseltine	Gouin	Methot
Belisle	Grosart	Petten
Burchill	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly, J. J. (<i>Ottawa West</i>)	Hollett	Roebuck
Cook	Lang	'Smith
Croll	Langlois	Urquhart
Eudes	Martin (<i>ex officio</i>)	Walker
Everett	Macdonald, J. M. (<i>Cape</i>	White
Fergusson	<i>Breton</i>)	Willis

30 Members
(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of Proceedings of the Senate of March 4th, 1970.

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Bourque, for the second reading of the Bill C-136, intituled: “An Act respecting the expropriation of land”

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Urquhart moved, seconded by the Honourable Senator Gouin, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion it was—

Resolved in the affirmative.”

ROBERT FORTIER,

Clerk of the Senate.

MINUTES OF PROCEEDINGS

Wednesday, March 18, 1970.

(2)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2.00 p.m. to consider:

Bill C-136, intituled "An Act respecting the expropriation of land".

Present: The Honourable Senators: Choquette, Cook, Fergusson, Flynn, Gouin, Haig, Hayden, Hollett, McGrand, Phillips (*Rigaud*), Smith and Urquhart. (12)

On motion of the Honourable Senator Haig, the Honourable Senator Phillips (*Rigaud*) was elected acting chairman.

Present, but not of the Committee: the Honourable Senator McDonald.

Ordered:—That 800 copies in English and 300 copies in French of the proceedings of the Committee be printed.

Witness heard in explanation of the Bill:

DEPARTMENT OF JUSTICE:

Mr. C. R. O. Munro, Assistant Deputy Attorney General.

It was RESOLVED by the Committee that all clauses of the Bill, with the exception of those clauses in respect of which amendments were proposed by the Honourable Senators Hayden, Choquette and Flynn, be approved, and that the amendments proposed by the aforesaid Senators be approved in principle, subject to re-drafting by the Department of Justice, and that the Minister appear before the Committee in relation to the proposed amendments.

The Committee adjourned at 3.05 p.m. to the call of the Chairman.

ATTEST:

Gérard Lemire,
Clerk of the Committee.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Wednesday, March 18, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-136, respecting the Expropriation of Land, met this day at 2 p.m. to give consideration to the bill.

Senator Lazarus Phillips (*Acting Chairman*) in the chair.

The Acting Chairman: Honourable senators, the business before us is Bill C-136, an Act respecting the Expropriation of Land, which has been sent to this committee for consideration.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 copies in French be printed.

The Acting Chairman: We have with us this afternoon Mr. C. R. Munro, Assistant Deputy Attorney General of the Department of Justice, who will explain the bill to us from the point of view of the Justice Department. He will answer any questions that honourable senators may wish to put before him.

Before calling upon Mr. Munro, I will like to make some observations which are maybe slightly unusual. We received an indication from Senators Hayden and Choquette of an intention to submit to this committee and its deliberations some amendments to this bill. There may be others present here today who may also want to submit amendments. Mr. Hopkins has prepared a first draft of such proposed amendments and with the consent and concurrence of Senator Hayden and Senator Choquette, this first draft was transmitted to the Department of Justice, because of the highly technical nature of the bill that we are considering. It was sent for the purpose of enabling the Justice Department to be made aware of the intention to submit the amendment. We are advised by Mr. Munro for the Justice Department and for his minister that it is the sense of this committee to approve of the proposed amendments, the Justice Department would desire to be given the authority from this committee to draft the amendments in the form that would harmonize with the remainder of the bill,

with a view also to determining whether there would be further consequential amendments that would be necessary.

There is the further suggestion that if, as and when such amendments are so approved by us in principle and such redrafting is made the Minister of Justice may indicate a desire to appear before us in order to discuss the proposed amendments. Since the subject matter is somewhat unusual in terms of procedure I thought I should explain it to you. If this meets with your approval, we will call upon Mr. Munro to deal with the bill at large. We will go through all of the sections and then await the consideration of any amendments that may be presented, but such amendments, if, as and when approved by this committee in principle, are to be dealt with in the manner which I have indicated.

Senator Hayden: Might I suggest that there seems to be, in all the discussions we have had on the bill, a pretty unanimous view favouring the bill and most of the clauses. There were just a few objections. I was wondering whether it would be in order to deal with those,—because the rest of the bill could be disposed of very quickly, I think.

The Acting Chairman: I certainly react with considerable favour to that observation, if it meets with the approval of honourable senators.

Hon. Senators: Agreed.

The Acting Chairman: If in effect we could get to the hard core of the proposed amendments, the assumption could be that, if no other amendments are suggested, this committee approves of the remainder of the bill. Does that meet with your approval?

Senator Haig: What clauses is it intended should be amended?

The Acting Chairman: May I call upon Senator Hayden to be good enough to deal with the proposed amendments. We have not got too many copies available here. However, every senator now has an opportunity at least to see a copy. Would Senator Hayden be good enough to proceed?

Senator Hayden: I had raised in the Senate the question that I did not think, in any proceedings under this bill, once it becomes law, it should be possible to bring into issue the merits of the expropriation authority, the general policy which led to the decision to expropriate.

I thought that was a matter for the minister. He has his responsibility to his fellow ministers and to Parliament and this issue should not be left to be decided in what I would call administrative proceedings such as would take place with a hearing officer, to have him reviewing the merits of the policy.

I had indicated that in Ontario the former Chief Justice McRuer, in his very elaborate report, had dealt with this question of expropriation. The Ontario act in this regard, which was enacted a couple of years ago, recognizes that principle which was enunciated by Chief Justice McRuer, that is, the authority, the policy behind the decision to expropriate, should not be reviewable by any administrative tribunal.

Whether the Ontario statute accomplishes that will be something which the courts will have to decide over the years but at least they have in Ontario specifically limited the subject matter of the hearing, where they make it the "taking of the land". The Ontario act in section 7(5) reads:

The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

That language was designed to keep the question of policy being considered by an administrative tribunal such as this inquiry has provided. I spoke about this in the Senate. This bill which we have before us really touches on this in three places, as you will see in the amendments.

I discussed my ideas with Mr. Hopkins, our Law Clerk, and he produced this first draft. In essence, he proposes to add, in three places in the bill, the language of the Ontario act. In that way, we are hoping to limit the authority of the administrative officer to an inquiry that centres around the taking of the land, but not the policy that lay behind the decision to take the land.

I present these amendments but, in line with what you, Mr. Chairman, have suggested, I think it is perfectly in order that the Justice Department should have a look at them in the context of the whole bill, rather than that we should just put them in here today as amendments, without necessarily establishing the correlation to the rest of the bill. So I would be perfectly satisfied if the committee saw fit to approve in principle of what we are seeking to accomplish and

then move on from there and ask Mr. Munro to go ahead and study it. If he can make a better job of it or if there is some correlation required, the pride of authorship would not be upset, I feel, in Mr. Hopkins, and would not be upset in me.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: No.

The Acting Chairman: May I suggest that in addition to the expression "the taking of the land or any part thereof" there be added "or any interest therein", in view of the fact that the present bill does cover the interest of tenants now.

Senator Hayden: That is right.

The Acting Chairman: That is just a thought of an extra point which may be needed, and there may be others. Mr. Munro, could we get your reaction to these three proposed amendments, before calling upon the senators to express their views.

Mr. C. R. Munro, Assistant Deputy Attorney General, Department of Justice: Mr. Chairman and honourable senators, I can try to explain the reasoning behind the bill in its present form. It is that not only the basic objectives of the Government is a matter of policy but also the selection of the actual site, the decision as to what piece of land to take, is also a matter of Government policy. Since it is a matter of policy, it must be the responsibility of the Minister of Public Works, under the statute, who after all is answerable for whatever policy decisions he makes in this respect.

While it is something for the minister to decide, we recognize that of course the minister and also his departmental officials may not be aware of all the relevant facts which would have a bearing on whether site A or site B should be taken. It was with that in mind that we provided this rather elaborate procedure, to give an opportunity to anyone who has any particular objection to any particular site to come along and state his objection at a public hearing, be represented by counsel and so on. In this way, the minister, before he proceeds with his intention to expropriate, will have had before him all the relevant factors.

The hearing officer has no responsibility on the question of policy. He has no responsibility to anybody at all. If he makes a recommendation as to what site should be taken, he makes it untrammelled by any considerations that the minister might have to take into account.

It was thought also that if the hearing officer were to make a recommendation it would in a very real sense fetter the minister in the decision that he has to make. For example, suppose the inquiry officer makes a public statement and publicly reports what his recommendation is, that he does not think that the

minister is right, he does not think that the minister should take this piece of property, now, as a practical matter, what effect is this going to have on the minister's decision in the matter?

We felt that for any hearing officer to make a public statement, about what he thought of the Government's policy, would fetter the minister in the exercise of his responsibility to make the decision in the final analysis.

Senator Hayden: Mr. Munro, if you stop there, do I understand that you are including in the question of policy decision not only the decision to take the land but to make the particular land that is selected part of the policy decision?

Mr. Munro: That is right, the actual selection.

Senator Hayden: Then you are precluding a possible objection—and there is no limitation on the objections here in the bill—the possibility of saying, yes, we agree the policy is a good policy but surely we can raise the issue that you are not taking the best piece of land.

Mr. Munro: Yes, that objection could be raised to the policy decision.

Senator Hayden: That could not be raised if you make it part of the policy—not the way I want it to be drawn.

Mr. Munro: Perhaps I did not explain myself. I am saying that the decision as to which piece of land must be taken is a policy decision that must be the responsibility of the minister. I am also saying that it is open to any person at all to object to the expropriation on any grounds at all. They can make their objection and the objection is brought to the attention of the minister. If he does not, then he proceeds.

Senator Flynn: It can hardly be on anything else but the choice of the site, because I don't think the minister would entertain an objection, for instance, by the expropriated party saying that the Government should not proceed with certain projects.

Mr. Munro: He would not entertain it for very long, am sure.

Senator Hayden: Mr. Chairman, it is all very well to have discussions at large as to what the minister may do and how he may react, but we have to look at the bill, and any person who is affected by an expropriation or notice of expropriation may make an objection, and that objection sets forth the nature and the grounds of the objection. I want to be sure that you cannot bring in issue the merits of the policy decision itself. I don't think for that purpose that the particular election is necessarily part of the policy decision. I think the policy decision is the decision to expropriate

for a certain purpose. That is why in the Ontario act they use the language "the taking of the land". That is the policy decision.

Senator Flynn: You mean that would be the decision to undertake a certain project?

Senator Hayden: Yes, and to expropriate land therefor.

Senator Flynn: Yes, there is a big difference there, because, as Mr. Munro just said, the minister would not be inclined to listen to any argument along that line.

Senator Hayden: I should have the right, and certainly there is such right under the Ontario statute, to question the particular location and to say that the Government is doing me an irreparable damage in taking my piece of property when in fact right near by, for example, there is some other property that would serve all of the purposes required; so I should be able to suggest that they look at that property. Now, that is not a policy decision.

Senator Flynn: Sometimes the two can be mixed up.

Senator Hayden: Yes, they can get mixed up.

Senator Flynn: For example, I had a letter recently from some people at Meach Lake. They complained about the decision of the National Capital Commission to expropriate all private property over there. Apparently the plan is to make a park out there. There you have the two mixed together: the policy—whether it is a good idea to make a park there in the first place; and whether they should expropriate all of the property.

Senator Hayden: The policy decision is really to make the park.

Senator Flynn: Yes, but at the same time you could say that you need only half of the land and that you could exclude this or that particular cottage. That means that very often the two will be mixed, the principle and the species.

Senator Hayden: If you apply the test to this and assume you include in the policy decision both decisions, the decision to expropriate and the decision to expropriate the particular property, what is there left for the person whose land is expropriated other than to say that you are not offering enough money? Are you going to limit him to that?

Mr. Munro: I think we are not quite at "idem", sir. Clause 7 of the bill refers to persons objecting to the intended expropriation. They can object to the intended expropriation on any ground. There are no words limiting the nature and the grounds. They have

to state the nature and the grounds of their objection to the intended expropriation.

Senator Hayden: If you stop there, you can say this is what the person can do, but under that wording and interpretation he could raise the issue of the policy decision.

Mr. Munro: Yes.

Senator Hayden: There is no place where you have excluded that?

Mr. Munro: Does it make any difference at all, really, though? In Ontario there are circumstances which make it necessary that the bill be different. Under the Ontario bill the hearing officer makes a recommendation. Of course, if you were going to make a recommendation on the basic policy issue that would perhaps be unthinkable under our bill. It is therefore necessary to restrict the issue upon which the hearing officer makes his recommendation. But under our bill there is no recommendation by the hearing officer at all. He listens to the nature and grounds of the objections and he reports on them to the minister. That is all. But he does not make any recommendations.

Senator Hayden: But the point is that, if the bill does not have this restriction in it, the door is not being shut on the possibility of raising an issue in policy. You go along and at some stage you may get into court and, if your bill is drawn in language that would permit the questioning of policy, then that could be an issue in the court. I don't want that possibility to exist.

Senator Flynn: You don't want what possibility to exist?

Senator Hayden: I don't want it to be possible to raise the policy behind the taking of land as an issue.

Senator Flynn: I don't know. This is a very delicate matter. For instance, if you look at it from the point of view of a municipal corporation, you always have the right to say you cannot expropriate for that very purpose because it is without your jurisdiction. If the federal Government, for example, were to expropriate in order to build an elementary school, you could say that that is without their jurisdiction. I think you should be entitled to raise that objection. That is just an example. I would not expect that to happen. But I submit that in principle you could raise an objection of that kind.

The Law Clerk: A jurisdictional problem is different from a policy problem, senator.

Senator Flynn: I know, but, if I understood the witness, he said that everything is included. There is no limit to the objections that can be raised.

Senator Hayden: That is what it would appear to be.

Mr. Munro: The words are "objects to the intended expropriation". You would have to find that the objection was in fact an objection to the intended expropriation.

Senator Flynn: It could be an objection in law and it could be an objection in fact.

Mr. Munro: If I might mention that once the notice of confirmation is registered, then the matters prior to the registration of the notice of confirmation, which of course takes place after the hearing, cannot be called in question.

The Acting Chairman: May I draw your attention, Mr. Munro, to paragraph 7, where the party in interest has the right to indicate the nature of his objection? Do you not think it would be desirable to follow through on Senator Hayden's suggested amendment for two reasons: from one point of view it restricts the grounds upon which the objection can be taken; and, from the other point of view, it does give a guide as to what the objecting party has the right to object to by merely being called upon to establish the lack of fairness, the lack of soundness or the lack of reasonableness. As you have it now, the parties in interest do not know on what basis to guide themselves.

As Senator Hayden says, the nature of his objection might go to the very policy matter, whereas the proposed amendments say on a negative basis the objection cannot go to the policy matter but can only go to the fairness, reasonableness or soundness of the proposed objective.

It would appear to me that it would be in the interest of the minister to introduce into the statute such a guide, because the way you have it now any objecting party can march from here to Timbuktu in the form or the nature of his objection, you see.

Senator Flynn: I was not here at the beginning of the discussion, but I would be inclined to take the opposite view.

The Acting Chairman: I see.

Senator Flynn: I would give the expropriated party all the latitude possible, because I think that is what we are trying to correct. Generally speaking, there has always been abuse by the expropriating party. I say generally speaking, but I don't say it has always resulted in injustices for the expropriated party. However, what we are trying to do now is to be entirely fair to the expropriated party and we are putting the

burden on the expropriating party to prove that he has the right, that this decision, whether it be a matter of policy or of choice, this question of fact, is sound. At least let us give him the chance to reconsider the decision. I think that is what the witness is suggesting.

The Acting Chairman: To cover your point, Senator Flynn, there is nothing to indicate in the present statute that the minister must make out a case of fairness, soundness or reasonableness.

Senator Flynn: I am not defending the wording of the bill.

The Acting Chairman: You are going further than Senator Hayden in saying that the objection should include even the objects.

Senator Flynn: Yes.

The Acting Chairman: Any further questions?

Senator Hayden: May I just add, because I do not think you were here when I mentioned this, that if you have a question of policy considered, whether it is only going to be the subject matter of a report, the report reflects the views of the reporting officer. To have an administrative official reporting in a report on the merits of the policy is foreign to any concept that I have.

Mr. Munro: If I may make one or two points; the proposed amendment would give the hearing officer the duty to report on whether the taking of the land or any part of it is fair, sound and reasonably necessary. In short, the hearing officer has to form an opinion.

The Acting Chairman: I do not think so, Mr. Munro, with profound respect. He has to report on what the interested party stated on fairness, soundness and reasonableness. The reporting officer is not a judicial officer concluding; he is merely reporting on what took place, as I read the bill. And certainly, as I understand Senator Hayden, the purpose is that the objecting party must state why he does not regard it as being fair, sound and reasonable, and having listened to the evidence, he reports what has been said either by transcription of the evidence or by summary, but the hearing officer does not act judicially in concluding.

Mr. Munro: Probably I am mistaken, but that is not the way I read the amendment. But that is what is intended.

The Acting Chairman: That is all the more reason for getting together here, and having at least a meeting of minds before redrafting is important.

Mr. Munro: The object of the amendment is merely to restrict the nature of the objection that may be made and nothing more.

Senator Hayden: That is it.

The Acting Chairman: So, you see, it is limitative in part as against the broadness of the bill but it is a guide in part as well as to what the objecting party has the right to say and to do.

Senator Flynn: But would you suggest, Mr. Chairman, that the political objections which I submitted could not be raised before the hearing officer? Supposing it could be without the competence of the Government to expropriate for that very purpose.

Senator Hayden: I do not think the hearing officer in this bill has any authority to make any decision of that kind.

Senator Flynn: I think you mentioned that he has no decision to make but that he only has a report to make and he could report on my objection, but I am just asking whether I would have to go to Court if I have an objection in law like the one I have just suggested.

Senator Hayden: But your only objection in law would be jurisdiction.

Senator Flynn: Yes, it is the most obvious. I do not want to be limited in this.

The Acting Chairman: I think your point is covered, senator, by the proposed amendment of Senator Hayden when he says "at the time and place so fixed provide an opportunity to each person appearing who served an objection upon the Minister, and such of those persons as he deems necessary in order to report to the Minister on the nature and grounds of the objections"—that is general—"and on whether the taking of the land or any part thereof is fair, sound and reasonable."

Senator Flynn: On the nature and ground?

The Acting Chairman: Yes.

Senator Flynn: What does Mr. Hopkins think?

The Law Clerk: It is a matter of policy and I am a simple draftsman.

Senator Flynn: I am not asking about the interpretation and I am not asking you to agree with my viewpoint.

The Law Clerk: I would say the amendment is pretty clear and speaks for itself.

Senator Choquette: *Res ipsa loquitur*.

The Law Clerk: And it would exclude any report on the policy of the Minister in deciding to expropriate.

The Acting Chairman: Honourable senators, as I see it we have reached the point that there is a consensus here and we can assure Mr. Munro that it is not intended that the hearing officer should act in a judicial capacity or make any recommendations, but rather that the objecting party can act and state his case within the framework of the proposed amendments.

Mr. Munro: To restrict the nature and grounds of the objections which may be made.

The Acting Chairman: In the form which we have suggested to you, if the honourable senators will approve.

Now, honourable senators, may we therefore state that it is the consensus of this committee that it would favourably consider three amendments suggested by Senator Hayden, as it appears before us, and that we are asking Mr. Munro to be good enough to draft in a form that will be satisfactory to the Justice Department the amendments that would give effect to the foregoing as explained here, and any consequential amendments in the statute that may be necessary. Is that agreeable, honourable senators?

Hon. Senators: Agreed.

The Acting Chairman: Is that agreeable, Senator Hayden?

Senator Hayden: Yes.

The Acting Chairman: Now if we may move on to some further amendments that Senator Choquette has in mind.

Senator Choquette: Honourable senators will recall that when I spoke on this bill in the Senate chamber, I intimated that I would propose in committee a few amendments, and I would like to state briefly before reading to you how I have worded these proposed amendments, that I have three amendments which I intend to propose, and the first one is that the Minister should not be allowed to and cannot delay making an offer without a Court order. If we refer to the wording of the act itself, it says—"When the Minister decides it is not practicable". This is so indefinite, and he wouldn't even have to give his reasons for finding that it is not practicable, so that in order to conform to the Ontario Legislation I would suggest that he cannot delay making an offer without a Court order, so that therefore a section 14(2) should mention a change which I will read briefly after I have dealt with the other two points.

My second proposed amendment is that if there is a Court application made, the costs payable should be paid by the Crown notwithstanding section 36, therefore a section 14(4) would be added to it, and the third proposed amendment is that the interest as a penalty paid should be a basic rate and not 5 per cent.

Now, dealing with this last proposed amendment, I would refer honourable senators to the bill itself at page 33 which defines "basic rate" in section 33(1) as follows:

In this section

(a) "basic rate" means a rate determined in the manner prescribed by any order made from time to time by the Governor in Council for the purposes of this section, being not less than the average yield, determined in the manner prescribed by such order, from Government of Canada treasury bills;

I have gone to the trouble of ascertaining what is usually the basic rate and I think at the present time it is 7½ per cent. I think I am correct in saying that. So that rather than have a rate of 5 per cent, as stated in the bill, it would be the basic rate and we could always refer to the basic rate definition in the act.

Coming back to my first proposed amendment, I think honourable senators have received a copy of my draft amendments, and I would refer to the bottom of page 1, which would be section 14(1)(c) to be added after paragraph (b), and it is underlined:

within the period extended by the Court under subsection (2), and if the Court does not extend time under subsection (2) forthwith upon the adjudication made by the Court under subsection (2),

We have to read (b) before that.

within ninety days after the registration . . .

I am now reading section 14(1)(b):

within ninety days after the registration of the notice, or, if at any time before the expiration of those ninety days an application has been made under section 16, within the later of

(i) ninety days after the registration of the notice, or

(ii) thirty days after the day the application is finally disposed of; or

. . . and this is my amendment, which would be (c) as underlined at the bottom of page 1.

Then my second amendment, if a court application is made, the costs paid by the Crown, notwithstanding section 36, should be on a solicitor and client basis. That is to be found on page 2:

(4) Notwithstanding section 36, the costs of all parties to an application by the Minister under

subsection (2) shall be paid by the Crown on a solicitor and client basis.

Those who practise law will know that there is some difference between costs payable on a party and party basis and those payable on a solicitor and client basis.

Senator Hayden: On that point, all our experience and rules in connection with costs is that we have two tariffs: we have a solicitor and client tariff; and we have a party and party tariff. Normally, in a proceeding of this kind it would be on a party and party basis. The solicitor and client basis is at a higher rate. The question is whether it is the client who has the right to select a solicitor, and if he uses his judgment, no matter what the costs may be, should the other person have to pay that amount or should it be strictly and impersonally on a party and party basis?

Senator Choquette: I think a solicitor and client basis would be the logical step to be taken. This is a bill favouring the individual Canadian, and there are many steps that a solicitor would take, forced by certain clauses of the act and the wording of the act, and his client would have to pay him for those steps. I think, in all fairness to this litigant, his costs should be paid on a solicitor and client basis for that reason. This is a suggestion I am throwing into the discussion, and it could be argued pro or con.

The Acting Chairman: Senator Choquette, would you be good enough to draw honourable senators' attention to section 36 of the act as we have it, which deals with the subject matter of costs, where the decision is apparently left to the court?

Senator Choquette: Yes.

Senator Flynn: In section 36(1), but in section 36(2) it is on the basis of solicitor and client.

Senator Hayden: That is where a party whose land has been taken gains an additional amount over and above what the minister paid. This is in the nature of a penalty.

Senator Flynn: That is all right. That is a privilege we give to the minister, to apply for delay to make the offer. I think it should fall in the same class as the case where the amount he has offered is not judged sufficient.

Senator Hayden: Mr. Chairman, I have stated my position, but I would not object to putting in "solicitor and client basis"

Senator Choquette: Those are my amendments, Mr. Chairman.

The Acting Chairman: Those are two, but you have not referred to the third.

Senator Choquette: The third one is at the bottom, of the second page:

Page 34: Strike out subclause (4) of clause 33 and substitute therefor the following:

"(4) When an offer is not made until after the expiration of the applicable period described in paragraph (b) of subsection (1) . . .

The Acting Chairman: Is it "applicable"?

Senator Choquette: Yes, it is "applicable". I have made the correction in my copy, but it is not in the others, apparently. This is using the wording of the act itself.

"When an offer is not made until after the expiration of the applicable period described in paragraph (b) of subsection (1) of section 14 for the making of an offer of compensation by the Minister, interest, in addition to any interest payable under subsection (2) or (3), shall be payable by the Crown at the basic rate on the compensation, from the expiration of that period to the day upon which an offer is made by the Minister."

The Acting Chairman: Honourable senators, you have the three proposed amendments of Senator Choquette. Following the procedure heretofor followed with respect to Senator Hayden's thoughts, do we now have the consensus of honourable senators that we should support the amendments as suggested by Senator Choquette under the three headings mentioned? Is that the view of honourable senators?

Senator Hayden: In principle.

The Acting Chairman: In principle, and it flows from that, as I understand it, that we will now be asking, with your approval, the Justice Department to prepare . . .

Mr. Munro: I have some remarks to make on this, Mr. Chairman.

The Acting Chairman: I am sorry, I apologize, and we will withdraw the assumption that there has been a consensus until we have heard from the department.

Senator Hayden: The jury has not been polled!

Mr. Munro: As I understand it the proposed amendment is entirely different from the provision in the Ontario statute. I do not know whether everyone has a copy of that provision. The similar provision in the Ontario statute is designed to protect the expropriating authority, whereas this proposed amendment is designed to protect the expropriated owner. I am not satisfied myself that it is really necessary, but the Ontario provision, which is section 25, in effect does

two things. It authorizes the expropriating authority to make the offer of compensation after the expiration of three months without having to pay additional interest. That is unlike the bill as it now stands. Under this bill, once the three month period goes by—that is, the 90 days—penalty interest is payable, but the Ontario statute authorizes the offer after the expiration of three months without the payment of any additional interest.

Senator Choquette: How soon after?

Mr. Munro: That is left to the court to decide. One of the objects of going to the court is to have an extension of the period during which you can make the offer without paying penalty interest.

The second thing is that it enables the expropriating authority to obtain possession after the three month period but without having made the offer, which is again something we cannot do under this bill except by way of order in council in very special circumstances. But, under the equivalent provision of the Ontario statute the expropriating authority can get possession after the expiration of the three month period, and without first making an offer.

The proposed amendment in this bill would merely require the Crown to make the offer within 90 days of the notice of confirmation, unless the time is extended; unless a court authorizes the Crown to make it later. Despite the fact that the Crown does not have its appraisal reports ready—and it may be a very complicated expropriation—unless the court extends the time then the Crown must make the offer right then.

It is to be remembered, I think, that under the Ontario statute the offer that is made is only an offer of the market value of the land. The business disturbance is left for a year after the expropriation. Under this bill the minister must make an offer of the total compensation, including that for business disturbance and everything else, within 90 days.

Senator Hayden: That is the better way.

Mr. Munro: Yes. So, within that period the minister must have his appraisals ready, and everything must be done in order to make it at that time. In many cases it will not be practical, and in those cases the statute provides for a penalty interest. It is not an economic return on the owner's money. It is a penalty of 5 per cent if the offer is not made within the 90 days.

If the Crown were forced to make an offer notwithstanding the fact that it did not have its appraisals all ready within the 90 days, and notwithstanding the fact that that is impractical, then probably a much lower offer than was realistic would be made. So, the owner would not get all his money—he certainly would not get 100 per cent.

The contrary could theoretically happen, and that is that too much would be paid to the owner, in which case we can sue to get it back.

Senator Hayden: On this point, Mr. Munro, my experience—and I have been through a lot of these cases in the years I have been practising—has been that by the time the Crown decides to expropriate they have done all their studies.

Mr. Munro: That may be so, but under this legislation we have some very short time periods.

Senator Hayden: But even before they make the decision to expropriate they have done their studies.

Mr. Munro: In some cases that is so, and hopefully that will be done more and more.

Senator Hayden: I have found them so well informed that I had to go out and get well informed myself right away.

Mr. Munro: The reaction from the public servants who are going to have to administer this is that it is almost impossible to get the appraisals ready to make the offer within 90 days. They are concerned about all the interest we are going to have to pay after the 90-day period. As to the rate of interest . . .

The Acting Chairman: Do not worry too much about that. The National Revenue Department will get the interest back.

Senator Hayden: Is it only the wealthy landowners who are going to be expropriated?

Mr. Munro: There are disadvantages to making the Crown pay the compensation within the 90 days, and I do not think that it is really necessary because there is the carrot that the minister is not going to have to pay penalty interest if he pays within 90 days, but as soon as the 90 days are up he is going to start paying the additional penalty interest.

As to the rate of interest, I point out that it is a penalty. It is not intended to be an economical return. At this stage of the game when this penalty interest is payable the owner has his land. When he has his land taken away from him—that is, when he has to give up possession—then the bill provides for an economic return on his money. But, at this stage of the game it is merely a penalty, and that is all.

Senator Hayden: Yes, I know, but the moment proceedings of this nature are instituted the owner's use of the land is very substantially restricted, as a matter of fact. What can he do with it? If he has a store there he can operate for a little while, but he is not going out to buy more merchandise.

Mr. Munro: There are all kinds of people, sir, down here on Sparks Street who are doing precisely that. They have been there for years.

Senator Hayden: What conclusion am I to draw from that?

Mr. Munro: The point is that in fact people do use their property. They are allowed to remain on their property, sometimes for years, after an expropriation.

Senator Hayden: I know, but that is a matter of agreement. We are not discussing that.

Mr. Munro: But even when there is no agreement . . .

Senator Hayden: I would not load a store up with inventory if I expected to be pushed out tomorrow, unless I had some understanding.

Mr. Munro: In any event, sir, it seems to me that it should not be a requirement that the compensation be paid at the end of the 90-day period.

The Acting Chairman: Thank you, Mr. Munro, and I apologize for not having called upon you before asking for the views of members of the Committee.

Honourable senators, do I understand that the amendments suggested by Senator Choquette meet with your approval in principle, and we should ask the Department of Justice to prepare the necessary amendments, and the consequential amendments, if necessary?

Hon. Senators: Agreed.

The Chairman: Would you be good enough to do that, Mr. Munro?

Mr. Munro: Yes, sir.

The Acting Chairman: Honourable senators, as I understand the situation, it will be necessary for us to adjourn this hearing . . .

Senator Flynn: Mr. Chairman, may I mention that I did give a warning in the house that I was not entirely satisfied with subclause (1) of clause 36. I would like the committee to express a view on that. I suggest that the rule be that in all cases judicial costs be paid by the expropriating authority, unless the opposition or the contestation be judged to be entirely futile. I do not like this discretion here, because when you read subclause (1) you will come to the conclusion, I think, that we are going to continue with the present practice, that when the expropriated party fails to get more than the offer made by the expropriating authority he has to bear the costs. In my opinion this is not fair, because it may be a matter of opinion or of a few thousand dollars. If you have the expropriated party

bear the costs you are in fact penalizing him and decreasing the compensation to which he is entitled. I suggest therefore that this subclause (1) should be re-drafted in that way, that unless the contestation of the expropriated party is futile, in all cases the costs should be borne by the expropriating authority.

The Acting Chairman: Would you accept the word frivolous?

Senator Flynn: Yes.

The Acting Chairman: Because futility might go to the question of the amount.

Senator Flynn: Yes.

Senator Choquette: There is a danger also, Mr. Chairman, that the presiding judge, using his discretion, might be guided by our courts in civil matters. I pointed this out when I spoke to the question. We all know that in an automobile accident, for instance, where the defendant decides that a certain amount would be fair compensation and deposits it in court and the case is disposed of, if the court allots an amount less than that which has been deposited the defendant is saddled with the costs. I say this in support of the suggestion made by the honourable Leader of the Opposition that there would be a danger of the presiding judge, when asked to use his discretionary power, basing his decision on those principles that are well known throughout the country.

Senator Flynn: Principles which should not apply in a case such as that.

The Acting Chairman: Mr. Munro, would you express your views in this regard?

Senator Cook: Would "frivolous" include fraudulent?

The Acting Chairman: I would think so, yes.

Mr. Munro: The object of the provisions of the bill as presently drafted is to require a person to act reasonably in bringing proceedings against the Crown. As a practical matter, the way it works out, in my experience at any rate, is that there are exceedingly few cases, an extremely small percentage, in which the court does not award at least a little more than the Crown's offer, the Crown paying the costs under the legislation as it now stands. Therefore the prospects of a party ever having to pay costs under clause 36, subclause (1) as it stands now are almost negligible.

Senator Flynn: I will not subscribe to that, because this act will appear to the court to be more generous than the system which now prevails. Therefore they may want to apply this more strictly than has been the case in the past.

Senator Hayden: Mr. Munro, you say the attitude of the courts would be such that they would treat the owner very nicely in any event. Then you should have no objection to putting that in the bill.

Mr. Munro: I would be prepared to do that.

The Acting Chairman: Honourable senators, is it the consensus in this particular instance that we support the suggestion of the honourable Leader of the Opposition with respect to the proposed amendment to clause 36?

Hon. Senators: Agreed.

The Acting Chairman: We ask Mr. Munro and the Department of Justice to proceed in the same form as in relation to the previous suggestions. Do we now have a consensus that, with the exception of the proposed amendments, this committee does not formally approve at this stage because we are adjourning, but we indicate approval of the bill in its present form other than the provisos and proposed amendments?

Senator Hayden: I so move.

Senator Choquette: I second.

Hon. Senators: Agreed.

The Acting Chairman: I have a memo that with the proposed amendments as they will be coming forward it is the feeling that we should ask the honourable Minister of Justice, who most likely, and I would say more or less definitely, will wish to appear before us. Do we then fix a date or wait for the Department of Justice?

Senator Hollett: After Easter.

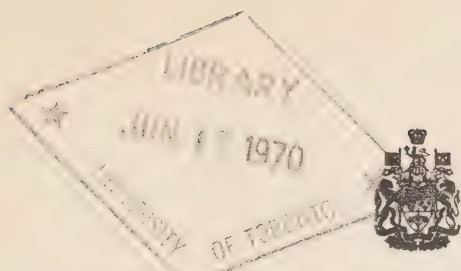
Senator Flynn: Whenever the minister is ready.

The Acting Chairman: We will fix a date whenever convenient after Easter for consideration of these amendments.

Senator Hayden: Or as soon as they are ready.

Senator Urquhart: We will be guided by Mr. Munro as to when they will be ready.

The committee adjourned.



Second Session—Twenty-eighth Parliament
1969-70

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 3

TUESDAY, MAY 12, 1970

Second and Final Proceedings on Bill C-136,

intituled:

"An Act respecting the expropriation of land".

WITNESSES:

The Honourable John N. Turner, P.C., Minister of Justice and Attorney
General of Canada.

REPORT OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*.

Argue	Fergusson	McGrand
Aseltine	Flynn (<i>ex officio</i>)	Methot
Belisle	Gouin	Petten
Burchill	Grosart	Phillips (<i>Rigaud</i>)
Choquette	Haig	Prowse
Connolly, J. J. (<i>Ottawa West</i>)	Hayden	Roebuck
Cook	Hollett	Smith
Croll	Lang	Urquhart
Eudes	Langlois	Walker
Everett	Martin (<i>ex officio</i>)	White
	Macdonald, J. M. (<i>Cape Breton</i>)	Willis

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of Proceedings of the Senate of March 4th, 1970.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Urquhart, seconded by the Honourable Senator Bourque, for the second reading of the Bill C-136, intituled: "An Act respecting the expropriation of land".

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Urquhart moved, seconded by the Honourable Senator Gouin, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion it was—
Resolved in the affirmative."

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, May 12, 1970.

(3)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 4:30 p.m.

Present: The Honourable Senators Aseltine, Choquette, Connolly (*Ottawa West*), Croll, Eudes, Flynn, Gouin, Grosart, Hayden, Hollett, Lang, Macdonald, McGrand, Phillips (*Rigaud*) (*Acting Chairman*) and Urquhart—(15).

In attendance: Mr. Russell E. Hopkins, Parliamentary Counsel and Law Clerk and Mr. Pierre Godbout, Assistant Law Clerk and Parliamentary Counsel, and Director of Committees.

Consideration of Bill C-136, intituled "An Act respecting the expropriation of land" was considered further.

The following witness was heard:

Department of Justice:

The Honourable John N. Turner, P.C., Minister and Attorney General of Canada.

On motion duly put it was *Resolved* to report the said Bill with the following amendment:

Page 36: Strike out subclause (2) of clause 36 and substitute therefor the following:

"(2) Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under section 29 in respect of an expropriated interest does not exceed the total amount of any offer made under section 14 and any subsequent offer made to such party in respect thereof before the commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable, direct that the whole of such party's costs of and incident to the proceedings be paid by the Crown, and where the amount of the compensation so adjudged to be payable to such party exceeds that total amount, the Court shall direct that the whole of such party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown".

At 5:00 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Patrick J. Savoie,
Clerk of the Committee.

REPORT OF THE COMMITTEE

TUESDAY, May 12th, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-136, intituled: "An Act respecting the expropriation of land", has in obedience to the order of reference of March 4th, 1970, examined the said Bill and now reports the same with the following amendment:

"Page 36: Strike out subclause (2) of clause 36 and substitute therefor the following:

"(2) Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under section 29 in respect of an expropriated interest does not exceed the total amount of any offer made under section 14 and any subsequent offer made to such party in respect thereof before the commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable, direct that the whole of such party's costs of and incident to the proceedings be paid by the Crown, and where the amount of the compensation so adjudged to be payable to such party exceeds that total amount, the Court shall direct that the whole of such party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown." "

Respectfully submitted.

LAZARUS PHILLIPS,
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Ottawa, Tuesday, May 12, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-136, respecting the Expropriation of Land, met this day at 4.30 p.m. to give further consideration to the bill.

Senator Lazarus Phillips (Acting Chairman) in the Chair.

The Acting Chairman: Honourable senators, we have a quorum. On your behalf, I welcome the Minister of Justice, who is good enough to grace us with his presence here, and also Mr. Munro, the Assistant Deputy Minister of Justice, and Mr. Hayes, the minister's executive assistant.

Honourable senators will remember that we dealt with the subject matter of Bill C-136 in this committee. During the course of our deliberations there was provisional approval of the bill as it had passed the other place, but there were three amendments suggested, one by Senator Hayden, one by Senator Choquette, and one by Senator Flynn. It was suggested that before proceeding with these proposed amendments it would be well to get the view of the Minister of Justice and his department generally with respect to them.

I have been advised by Senator Choquette that he is not pressing the amendment which he had discussed in the conference which previously held. We are now down to two amendments, one by Senator Hayden and one by Senator Flynn. With your approval, Mr. Minister, before the calling upon you I will ask Senator Hayden if he is still of the same view.

Senator Hayden: I was concerned about the position of the minister, but the minister does not feel the same concern, and therefore I am not pressing the proposed amendment.

Senator Croll: Mr. Chairman, it so happens that I was busy elsewhere. Would you tell me what Senator Choquette's and Senator Hay-

den's amendments, that they have so generously dropped, were?

The Acting Chairman: I think it would be best, Senator Choquette, if you would summarize your amendment.

Senator Choquette: I really have lost track of the amendment which I proposed.

The Acting Chairman: I think the basic points were with respect to delays within which decisions had to be made by the minister and certain proposed procedures to be taken before the courts which would be conditional upon the right of the minister to move within the specified period. It was a procedural point with respect to the necessity of the minister's decision within the defined period.

In so far as Senator Hayden's amendment is concerned, Senator Croll, Senator Hayden felt, following, I think, the Ontario precedent of analogous legislation, that the hearing officer should not be given the jurisdiction or right to deal with the subject matter of the policy decisions of the minister that would lead to a proposed expropriation.

As I understand it, and as Senator Hayden just indicated, he thought it was being done for the protection of the minister, but he probably received information that this is an instance where the minister may not desire such protection. Am I right on that?

Senator Hayden: That is the conclusion to which I came. What I would like the minister to do is give us his connotation of the word "report". In discussing this, Mr. Minister, it was pointed out that the hearing officer is simply an extension of your ear. In other words, he gathers together all the parties who are objecting to the expropriation, and hears their story—what their objections are—and then he is supposed, as the bill says, to report to you on the nature and grounds of the objection. I was concerned that the report, as I conceive a report, goes further than simply

a statement of what these people said; that is, that there might be some opinion or some recommendation in it. Your assurance went this far, that that is not the intention, but you cannot tell how it will work in practice. I suppose that if there is anything incorporated in the report that smacks of comment or opinion you, as minister, will insist on having it struck out.

Honourable John N. Turner, Minister of Justice: Mr. Chairman and senators, first of all, I want to thank you for your courtesy in inviting me to explain my and the Government's position on the bill with respect to the amendments that were put informally before your committee.

I suppose, Mr. Chairman, that one of the reasons why I can be a little freer in dealing with the minister's position is that within the terms of the bill I am not the minister; it is the Minister of Public Works. I am assured that the Minister of Public Works is willing to contemplate a hearing in as wide terms as possible, not only as to the merits of the expropriation or the property expropriated, but also the policy behind the expropriation itself. For this reason we do not limit the parties who may appear at the hearing to those having an interest in the property, either real, personal or leasehold. Conceivably, municipal planning boards, regional planning boards, or even provincial boards or communities could appear to object to the policy of the minister's expropriation. The duty of the hearing officer, as nearly as you have put it, is to act as his ear and to report those objections to him—the nature and grounds of the objections—and then it will be up to the Minister of Public Works to decide, in the light of those objections, whether to proceed with the expropriation. That will be an administrative decision for which he will be held accountable to his colleagues in the Government and to Parliament. That being so, and since the hearing officer himself takes no position, we felt that the Minister of Public Works could risk the lack of protection you wanted to give him.

Senator Hayden: As Minister of Justice, are you satisfied that the use of the word "report" without any qualification is such, in the connotation in which it is used, that it only embodies a statement of the representations which have been made.

Hon. Mr. Turner: I believe I can say that in the way it is drafted, and the instructions we give to hearing officers will be so phrased.

Senator Hayden: Mr. Minister, when you in the House of Commons refer a bill to a committee, you ask the committee to examine and report on it. What is the connotation of "report" there?

Hon. Mr. Turner: Of course, the words here, Mr. Chairman, are "report in writing on the nature and grounds of the objections made". There is nothing about his recommendations or his assessment.

Senator Hayden: Of course, there is nothing in the reference to the committee, but in the report you sometimes get recommendations.

Hon. Mr. Turner: I suppose it is conceivable that the odd hearing officer may trespass beyond his terms of reference.

Senator Hayden: Who is going to regulate and discipline him.

Hon. Mr. Turner: I think it might be pointed out to him that he has exceeded his terms of reference, but in any event the minister is not bound by any recommendations which he may choose to make, because that is not within his terms of reference.

Senator Hayden: I can see, if he did step out of line, that it might in some way reflect without any foundation on the minister and on the policy decision.

Hon. Mr. Turner: Conceivably.

Senator Hayden: I did not think that an administrative official should be empowered to pass on a question of policy. But if you do not want it, I am not going to press it.

Hon. Mr. Turner: Our view is that the minister has sufficient protection here.

Senator Flynn: The report would not be binding on the minister.

Hon. Mr. Turner: The report is not binding in any event.

Senator Croll: What is the third one, Mr. Chairman?

The Acting Chairman: We are down to the third point which was suggested by Senator Flynn which, at the request of this committee, has been reduced to a formal amendment, a copy of which I have given to Senator Flynn. The senator's first reaction is, Mr. Munro, that we may not have quite covered his point in full. Would you be good enough to speak to this, senator?

Senator Flynn: Mr. Chairman, I think the amendment meets my point, but not entirely.

The Acting Chairman: I think your review appears on page 15 of the proceedings of March 18, 1970.

Senator Flynn: My idea was that I wanted to embody in the act the principle that, unless the contestation of the expropriated party was adjudged frivolous by the court, the expropriated party would be entitled to all his costs even if the amount determined by the court is the one offered by the expropriating party. In other words, if the offer was adjudged to be sufficient the expropriated party would nevertheless be entitled to his costs unless his contestation is adjudged frivolous by the court, the idea being that the expropriated party is entitled to disagree with the offer which is made by the expropriating party. If he does that in good faith he should not be penalized, or should not see his indemnity diminished by the fact that he would have to pay the costs.

The amendment which has been drafted by the department meets this to some extent. This is clause 36 (2) which reads:

Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under section 29 in respect of an expropriated interest does not exceed the total amount of any offer made under section 14 and any subsequent offer made to such party in respect thereof before the commencement of the trial of the proceedings, the court shall, unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable, direct that the whole of such party's costs of and incident to the proceedings be paid by the Crown...

My objection is to the wording, "unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable". I do not think this is the test. Suppose he has asked for a lot more than is offered, but his contestation is made in good faith. He should not be penalized just because he asked for a lot more. I think it should read "unless it finds the contestation made by such party in the proceedings to have been unreasonable". The principle is in the contestation and not in the amount that is claimed by the expropriated party.

The Acting Chairman: I am drawing your attention, Senator Flynn, to page 15 of the

previous proceedings and the expression you used "that unless the contestation of the expropriated party is futile". You used the word "futile". You did not use the word "frivolous", which probably would be too broad.

Senator Flynn: I think it would be better if you replace "the amount of the compensation claimed by such party" by "contestation made by such party".

Senator Hayden: Mr. Chairman, I think the difference is that Senator Flynn thinks that the attitude of the contestant in approaching the contest is what should govern. If the offer is \$100,000, and finally there is an award of \$110,000—how do you determine whether an amount is unreasonable?

Senator Croll: Are we talking about unreasonable or unrealistic?

Senator Flynn: Unreasonable.

Senator Croll: How do you define "unreasonable"? You might be able to define "unrealistic". If something is worth \$50,000, and \$100,000 is asked, then it is unrealistic, and it may be unreasonable too. "Unrealistic" seems to me to be a more down-to-earth word.

Senator Flynn: If the experts of an expropriated party give the opinion to the court, and so advise their client, that in spite of the offer of \$100,000 by the expropriating party their client is entitled to \$200,000, and the court comes to the conclusion that \$100,000 is sufficient, then, in that case, the amount which is claimed by the expropriated party is so far away from the amount offered that it would be adjudged to be unreasonable. But I do not think this is the test. If he contests the amount offered, but adduces no further evidence, and if he does not show any good faith in the evidence which he brings before the court, then even if the difference is only \$10,000, I think the court should be entitled to punish him for this frivolous contestation, to use the word of Senator Phillips. In the other case that I mentioned it would be unreasonable not to allow him the costs just because the experts were so far apart in their assessment.

Senator Hayden: I am inclined to agree. The test should be the conduct of the contestant.

Senator Flynn: Yes, that is why I speak of contestation.

The Acting Chairman: Honourable senators, as I think it might be well to hear from the minister on the point.

Hon. Mr. Turner: Mr. Chairman, basically, as I understand Senator Flynn's proposal, the claimant should be entitled to his costs if he contests before the Exchequer Court, in any event, provided that the amount of his claim, or the type of his claim, is not unreasonable.

Senator Flynn: His contestation.

Hon. Mr. Turner: I want to get to that point. We were concerned when we first looked at this proposal that it would make negotiations very difficult. In other words, if the owner of the expropriated interest were to know that his costs would be covered in any event then the negotiating procedure would not have such a binding influence on the parties.

Senator Hayden: You mean, by its intimidating effect.

Hon. Mr. Turner: You can put it in any way you wish. It might mean that the negotiations would be considered to be just a formal preliminary to proceedings.

We think that in terms such as this we could live with the amendment, first of all, because the court ordinarily awards costs to the claimant any way—and even within the terms of this bill there is a discretion given to the court. Secondly, we felt that it was likely that the court would tend to construe the word “unreasonable” that we have here against claimants if it became apparent that the negotiating procedure was not being used properly, and claimants were coming to the court as a matter of course. Obviously, the court would tend to interpret the awarding of costs in such a way as to not encourage a flood of litigation that did not have any reasonable basis.

First of all, I can accept Senator Flynn's amendment, so now we are just talking about how it should be drafted. What I am trying to achieve here is an objective test. I get a little nervous when we start talking about *bona fide* intention. A *bona fide* intention is a subjective test that has to be measured in objective terms by evidence. There must be some sort of evidence adduced. Therefore, I am looking for an objective test which the court can assess.

Secondly, I do not think there is much difference, if there is any at all, between contestation and compensation, because the only

type of contestation is over the amount of compensation. The only type of contestation that brings a matter before the court is the amount of compensation, and nothing else. The objective test that we felt was reasonable is the amount of the compensation he is seeking, reasonable under the circumstances. If the amount is reasonable then the contestation is reasonable, and if the amount is unreasonable then the contestation cannot be reasonable. I know there is a shading of difference, but I do not want to put the court in a position where it has to assess intention.

Senator Flynn: It can be based on the evidence adduced by the expropriated party. I suggest to you, for instance, that if the Government offers \$50,000 and if the expropriated party says he wants \$55,000 then the test would not be whether the amount claimed was unreasonable because it cannot be unreasonable to ask \$55,000 when you are offered \$50,000. But if on the *bona fide* advice of experts he claimed twice the amount offered it might be unreasonable if the court did not accept the viewpoint of the experts.

The Acting Chairman: Could we not marry the two ideas to the theme of “unreasonable” and “reflecting bad faith”.

Senator Flynn: If it reads “unless it finds the contestation made by such party in the proceedings to have been unreasonable”, it will be based on the evidence that is adduced.

Senator Croll: Mr. Chairman, if you start reflecting bad faith you are getting down to a basis that should not be there in a civil action. It is something which is completely foreign to it.

Senator Flynn: It is the contestation that has to be unreasonable; not the amount claimed.

Hon. Mr. Turner: Suppose the Government's valuation is in the neighbourhood of \$50,000, and suppose there is a special interest, history, or family tradition attached to the property. I am not talking about special use, because that is covered. Suppose the attachment that the expropriated owner has to the property really prevents him from having a reasonable attitude toward how it should be valued. He might be in good faith when he says that he wants \$150,000, and that he believes the property is worth \$150,000. Even though this man is in good faith in asking three times the value of the property, the court is put in a difficult position.

Senator Flynn: I remember the famous case of *Fraser*.

Hon. Mr. Turner: I was in that case.

Senator Flynn: You will remember the difference between the final decision of the Supreme Court of Canada and the decision of the trial court. I believe it was 50 times more than the amount assessed by the trial court.

Hon. Mr. Turner: Of course, that did not go to a matter of intention. The reason we were able to persuade the Supreme Court to give so much to Fraser was that the Crown had a special use for the property, namely the building of the Canso Causeway.

Senator Flynn: That is why I suggest to you that if you offer \$50,000 to someone and he says that the property is worth \$300,000, and if the final judgment says that the offer is insufficient but the claim of \$300,000 is unreasonable, the expropriated party would not be allowed his costs, whereas if the difference between the two was only \$10,000 the interpretation on the wording of this amendment would be different. I suggest to you that it is the contestation itself that is of the essence, and not the amount which is claimed by the expropriated party in comparison to the amount offered.

Hon. Mr. Turner: I like your point, senator, and I think we have met it.

Senator Flynn: I am not satisfied. If you claim just a little more than what is being offered you will have a contestation.

Hon. Mr. Turner: Not necessarily. Mr. Munro points out that if an expropriated owner were to go for \$5,000 more than what was offered and were only to achieve that, the court might well hold in the circumstances that it was not reasonable to put the court to the test for such a difference. That is possible, but what we do not want to discourage is a reasonable claim. I feel that a reasonable claim can be assessed by a reasonable claim for compensation. Since the contestation is necessarily related to the compensation, and since the court will have to have an objective test, I would suggest to you that we get a more accurate reflection of what we want to achieve by relating it to the contestation rather than to the institution of proceedings.

Senator Flynn: I wanted to make it relevant to the evidence adduced by the expro-

propriated party. That is where we find the attitude of the expropriated party, to see whether it is reasonable or not. There is quite a difference. If I have an expert telling me that I should claim three times the amount offered, and he comes before the court and says "I believe in good faith that this man is entitled to three times what is offered", then I think that I should be allowed my costs in a case like that, even if I do not succeed. On the other hand, if I came for only \$5,000 more than \$100,000, and I brought no evidence to justify the additional \$5,000, then my contestation is not reasonable, and I should not be entitled to costs.

Senator Hayden: Mr. Chairman, I was wondering whether the minister would consider introducing the fictional reasonable man.

Hon. Mr. Turner: Of course, we have reason in here right now. That is the test that we have here. It might well be that a claimant is in perfect good faith in relying on an outrageous evaluation by a valuator who was trying to convince him.

I leave it to you, senators. I feel that the intention of the party in going to court, and the assessment of that intention as reasonable or not, is related directly to the amount of compensation which he is trying to obtain, because that is the only issue.

Senator Croll: Mr. Chairman, I will move the amendment.

Senator Flynn: Thank you, Senator Croll.

The Acting Chairman: I was directing myself to Senator Flynn who was dealing with the subject. I was hoping that he might move it.

Senator Flynn: I will leave the responsibility to Senator Croll since he is entirely satisfied with the wording, and I am not.

Senator Croll: No, it is your amendment.

The Acting Chairman: I would prefer directing myself to you, Senator Flynn. I would like to know if half a loaf is better than none. Would you be willing to move the amendment.

Senator Flynn: I am not inclined to move the amendment. I think it is an improvement, but I am not entirely satisfied. Since Senator Croll feels that everything is correct, I will let him move the amendment.

Hon. Mr. Turner: I suggest that it is not a question of half a loaf or a loaf. I think the senator is getting a full loaf, but he does not like the baker.

The Acting Chairman: Senator Croll, would you move the amendment in the form in which we have before us.

Senator Croll: Yes. I move that on page 36, strike out subclause (2) of clause 36 and substitute therefor the following:

"(2) Where the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under section 29 in respect of an expropriated interest does not exceed the total amount of any offer made under section 14 and any subsequent offer made to such party in respect thereof before the commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by such party in the proceedings to have been unreasonable, direct that the whole of such party's costs of and incident to the proceedings by paid by the Crown, and where the amount of the compensation so adjudged to be payable to such party exceeds that total amount, the Court shall direct that the whole of such party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown."

The Acting Chairman: That is seconded by Senator Urquhart. All those in favour of the amendment?

Senator Choquette: I would like to ask a question of the minister. I have already intimated that I am not pressing any amendment. Why is it that under a similar act in Ontario an application to court is necessary to extend the time for making an offer? Why is it not necessary under this act, and why is it left to the discretion of the minister? Is there any special reason for that?

Hon. Mr. Turner: Because under the Ontario act they do not have to pay interest if they get the time extended.

The Acting Chairman: Are you ready for the motion, honourable senators?

Hon. Senators: Agreed.

The Acting Chairman: Shall I report the bill as amended?

Hon. Senators: Agreed.

Senator Hayden: I move that we adjourn.

The Acting Chairman: Thank you, honourable senators. Thank you, Mr. Minister.

The Committee adjourned.



Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 4

WEDNESDAY, MAY 27th, 1970

*Complete Proceedings on Bill C-5,
intituled:*

"An Act to provide for the relief if persons who have been convicted
of offences and have subsequently rehabilitated themselves."

WITNESS:

Mr. J. H. Hollies, Q.C., Departmental Counsel, Department of the
Solicitor General.

REPORT OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*.

Argue	Flynn (<i>ex officio</i>)	McGrand
Aseltine	Gouin	Methot
Belisle	Grosart	Petten
Burchill	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly, J. J. (<i>Ottawa West</i>)	Hollett	Roebuck
Cook	Lang	Smith
Croll	Langlois	Urquhart
Eudes	Martin (<i>ex officio</i>)	Walker
Everett	Macdonald, J. M. (<i>Cape</i>	White
Fergusson	<i>Breton</i>)	Willis

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of Proceedings of Senate of Thursday, May 21st, 1970.

“Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Fournier (*de Lanaudière*), seconded by the Honourable Senator Bourget, P.C., for the second reading of the Bill C-5, intituled: “An Act for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves”.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Fournier (*de Lanaudière*) moved, seconded by the Honourable Senator Denis, P.C., that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.”

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

Wednesday, May 27, 1970.

(4)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 4.00 p.m.

Present: The Honourable Senators: Aseltine, Cook, Eudes, Fergusson, Hollett, Méthot, Phillips (*Rigaud*), Prowse and Urquhart. (9)

Also present but not of the Committee: The honourable Senator Fournier (*De Lanaudière*).

In the absence of the Chairman and on MOTION of the Honourable Senator Aseltine, the Honourable Senator Phillips (*Rigaud*) was elected *Acting Chairman*.

Ordered: That 800 copies in English and 300 copies in French of these proceedings be printed.

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

The committee proceeded to the consideration of bill C-5, intituled: "An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves."

The following witness was heard in explanation of the Bill:

Mr. J. H. Hollies, Q.C., Departmental Counsel, Department of The Solicitor General.

After discussion and on MOTION of the Honourable Senator Cook, it was *Resolved* to report the said Bill without amendment.

At 4.40 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Gerard Lemire,
Clerk of the Committee.

REPORT OF THE COMMITTEE

Wednesday, May 27th, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-5, intituled: "An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves", has in obedience to the order of reference of May 21st, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

LAZARUS PHILLIPS,
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Wednesday, May 27, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-5, to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves, met this day at 4.00 p.m. to give consideration to the bill.

The Clerk of the Committee: Honourable senators, in the unavoidable absence of the chairman is it your pleasure to elect an acting chairman?

Senator Urquhart: I nominate Senator Phillips.

Hon. Senators: Agreed.

Senators Lazarus Phillips (*Acting Chairman*) in the Chair.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 in French be printed.

The Acting Chairman: Honourable senators, the subject matter is a consideration of Bill C-5 which you will remember is the Criminal Records Act. We have before us Mr. J. F. Hollies, Q.C., Senior Solicitor, Legal Services Division, Department of Solicitor General. In addition to his own eminence and worth, Mr. Hopkins informs me that he served in the Royal Canadian Air Force with Mr. Hollies during the last war, so that adds a special tag of approval upon you, Mr. Hollies.

Mr. J. F. Hollies, Senior Solicitor, Legal Services Division, Solicitor General Department: Thank you, sir.

The Acting Chairman: This bill received second reading in the Senate, Mr. Hollies, and there was some observation made which necessitated a motion to send this bill to the Standing Senate Committee on Legal

and Constitutional Affairs. We will be grateful to you if you will be good enough to go over the bill in general terms and give us the benefit of your views and guidance.

Mr. Hollies: Mr. Chairman, honourable senators, I really have no set piece prepared and I do not think this will come as a grave disappointment to you. This was, if I may say so, introduced very thoroughly in the Senate by Senator Sarto Fournier.

Basically the bill is designed to remove the stigma from those who have really and truly rehabilitated themselves after having been punished for a criminal offence. It does this in a variety of ways, but basically it provides for the sealing of their judicial records, the segregation of those records, keeping them apart and closed from the public, not to be made available to the public except with special permission from the Solicitor General of Canada. That permission can only be given for one of two reasons, to aid in the administration of justice or because the security of the state or its allies is in some way involved.

There is provision in the bill for non-disclosure of records that have been pardoned. It has the effect so stated in the bill of "vacating the conviction." That is, the conviction shall be deemed no longer to have force and effect and to be evidence that the man, after the proper inquiries have been made by the National Parole Board, is deemed to have rehabilitated himself.

Senator Fergusson: I presume this applies to women as well?

Mr. Hollies: I should hardly like to exclude the honourable senator from the ambit of the bill. I realize she does not need to benefit by it.

Senator Fergusson: I realize it is covered in the Interpretation Act.

Mr. Hollies: The bill certainly covers the very few female offenders that we have—and have had.

Senator Hollett: Very few?

Mr. Hollies: Yes, sir.

Senator Fergusson: The number is very small.

Senator Prowse: Chivalry is not dead!

Mr. Hollies: Nor is truthfulness, for I can prove that by statistics. The pardon, as I was saying, is evidenced by the fact that he or she is, in the eyes of the parole board, deemed to be of good character and the previous conviction should no longer be treated as being an adverse reflection on the character of the person pardoned.

Senator Aseltine: No matter how many previous convictions he has had?

Mr. Hollies: That is quite right, sir. There are cases where the offender has a great number of convictions. For example, one man I am thinking of from the Province of Quebec had something like 15 convictions. They were incurred a considerable time in the past and were occasioned by the fact that he had been an alcoholic. Then he joined Alcoholics Anonymous and became a highly respected member of the community. He is certainly one of the people contemplated by the bill. In actual fact that man was pardoned under Letters Patent by the Governor General.

Senator Aseltine: In fact all these convictions against him would prevent him from getting employment.

Mr. Hollies: Apparently not. I do not have his personal history to that extent. Whether he had private means or help from relatives I do not know.

Senator Aseltine: I thought he had been refused employment. In any event, the provisions of this bill would cover his case.

Mr. Hollies: That is so, sir. The senator raises the other important aspect of the bill that employers, so far as the legislative competence of Parliament extends, are forbidden to have on their application forms any question requiring an applicant to disclose an offence for which he has been pardoned.

Senator Prowse: I can see where people should perhaps have the right to put on the form that they have never been convicted of a criminal offence. Would they add to it, "Have you ever been convicted of a criminal offence for which you have not received a pardon?"

Mr. Hollies: Precisely, sir. The idea behind this is to get the person over the first hurdle in gaining employment. I would be less than frank if I did not say what is going to be open to employees. Experience has shown that the first hurdle to get over for the person who has come into conflict with the law is the application form. If the employee can say in response to a question that it is true he has been convicted of an offence but that he has been investigated and rehabilitated and there is pardonable proof, then he stands a good chance of getting a job.

Senator Fergusson: I understood Mr. Hollies to say that the man he was referring to had been granted a pardon under Letters Patent. That does not answer the question as whether people committing a number of offences would be pardoned under this act.

Mr. Hollies: In answer to a previous question, I was using that example as typical of the experience. If I may extend on that. I am now speaking for the National Parole Board and I really have no authority to do so. The practice within the department will be that if a person has a number of offences they will take a harder look at him. The inquiries will be more far-reaching than they would be in the case of an isolated offence. It may be that in view of the fact a person has had ten offences, they may consider that the minimum time is not sufficient in order to determine rehabilitation.

Senator Fergusson: But he would be eligible for consideration?

Mr. Hollies: Certainly.

Senator Fournier (De Lanaudière): As I am not a member of the committee I would like to ask the permission of the chairman to say a few words.

The Acting Chairman: Of course, as senator sponsoring the bill in the Senate.

Senator Fournier (De Lanaudière): I am sorry I have been a little late. So far as the United States are concerned, when you cross the border, you might be asked the question "Have you ever been sentenced?" So, having regard to the present bill, what would be the answer?

Mr. Hollies: The man must either lie or he must say "Yes, I have been." The bill does not remove the fact of conviction.

Senator Fournier (De Lanaudière): And does he have a certificate to the effect that he has been pardoned?

Mr. Hollies: Yes, sir, the schedule to the act sets out the pardon in the form in which it will be granted. And each grant of a pardon will be accompanied by that certificate to the man.

Senator Fournier (De Lanaudière): So that might be a matter of agreement between the Government of the United States and the Government of Canada so that if a man declares he has been sentenced but pardoned the doors will be opened to him in the United States?

Mr. Hollies: Quite, senator. This in fact was one of the proposals put forward in the Ouimet Report—that there should be an international agreement to recognize rehabilitation in some such fashion as you suggest.

Senator Fournier (De Lanaudière): Mr. Chairman, I would like with your permission to make a comment. I had the honour to sponsor this bill in the Senate. It is not a perfect bill; it is a first try. I think we should vote this bill as it is and let us get what experience we can from it. After a while in the light of that experience, we may be able to bring about some corrections, and I will be delighted to sponsor it, and the corrections, if I have the occasion.

Thank you, Mr. Chairman.

Senator Urquhart: Mr. Chairman, this bill simply give a person who is being convicted a certificate of good behaviour. Is not that all it amounts to?

Mr. Hollies: With respect, I think it goes a great deal further.

Senator Urquhart: It does not wipe out the crime.

Mr. Hollies: That is true.

Senator Urquhart: And if he is asked the question "Have you ever been convicted of a crime?" in filling out an application for employment, he must say yes.

Mr. Hollies: Yes, except that question is in itself forbidden so far as the Parliament of Canada has legislative competence. That is so far as matters within the federal sphere are concerned.

Senator Urquhart: But that question is there always. "Have you ever been convicted of an offence?"

Mr. Hollies: It is now on some application forms in the federal sphere, to use the same term. But it is not on either type of application form in general use in the public service.

Senator Urquhart: But in private business?

Mr. Hollies: In private business we have taken the view that we cannot legislate. But it is there, yes, and this is why, if I may, following on what Senator Fournier (De Lanaudière) has said, it has never been the contention of the department that the bill is a cure-all. We would hope that provincial legislation will complement it so that they will deal with the areas over which they exercise control.

Senator Urquhart: Well, I still think it is merely a certificate of good behaviour.

Senator Aseltine: Has any progress been made to that effect with the provinces?

Mr. Hollies: No, senator, the provinces have not been formally approached on this at all. The proposition has been that we would hope the Parliament of Canada will give the lead, and then we can go out and waive the bill, or the act as it will then be, in the face of the attorneys general and the premiers and say, "Please do something yourselves".

Senator Méthot: What about the insurance companies, on life for example? Is there not a practical question involved there?

Mr. Hollies: Last time I got insurance I did not have to answer that question. I do not know what the general practice is, quite frankly.

Senator Prowse: They send somebody around to talk to your neighbours usually.

Mr. Hollies: That may have been why the R.C.M.P. was scouting around me recently! I thought it was just a security check.

Senator Fergusson: Could Mr. Hollies tell us exactly what is the meaning of clause 8(d):

... any work, undertaking or business that is within the legislative authority of the Parliament of Canada.

What does that cover?

Mr. Hollies: This is the wording used in connection with the Canada Labour Code. It is the wording devised by Justice to cover the general ambit of everything in the competence of the Parliament of Canada. For example, it covers the contractor who has contracts for such things as construction and the provision of services to the Government of Canada. It obviously does not cover such things as a private construction company incorporated in Manitoba not having any contracts with the Government. The words "work, undertaking or business . . . within the legislative authority" are within that general framework. I cannot be more precise. I do not know if it has ever been subject to definite legal interpretation. I am sorry. I am not trying to fudge the question; I just do not know the complete answer to it, and I doubt if it is ascertainable.

Senator Fergusson: I thought it had a wider meaning than that, but I am probably wrong.

Mr. Hollies: What happened was that the Department of Justice was given instructions to draft this in the broadest possible terms, and they said that the broadest possible terms had been used in the Canada Labour Code; those were the broadest they could devise and they would adopt the same language for this bill.

Senator Hollett: I notice that the word "offence" has not been defined. At least I do not see any definition. What is an offence under this bill? If a man is convicted of murder, surely he does not get away as easily as this bill says, does he?

Mr. Hollies: First of all, senator, I draw attention to clause 3, the application for pardon:

A person who has been convicted of an offence under an Act of the Parliament of Canada or a regulation made thereunder may make application for a pardon in respect of that offence.

That delimits the offences. It would cover murder, but the man's punishment for murder can never be said to have expired five years ago. Even if he is put on parole he is still deemed to be under sentence of imprisonment, so a man could not get a pardon . . .

Senator Hollett: I was wondering just how far up the scale this bill goes.

Mr. Hollies: Let us take the next most heinous offence to murder, whatever offence may be considered to be next in the scale. Say it is rape. A man may

get a 20 years sentence for rape; he could get life, but say 20 years. Until he has served that sentence and for five years thereafter he may not apply for a pardon. The five years is a minimum period, and he might not get a pardon even on the minimum period. It would depend on the thorough reports. He may be completely reformed.

Senator Prowse: This bill does not give him a pardon. It gives him a right to apply for it.

Mr. Hollies: Precisely.

Senator Prowse: And then they may pardon him.

Mr. Hollies: They may or may not, depending upon the conclusions they reach after the investigation.

The Acting Chairman: I would like to put a question now if Senator Fournier will allow me to go first.

Senator Fournier (De Lanaudière): I have received my answer. I have been enlightened by the replies given by Mr. Hollies.

The Acting Chairman: In clause 3, to which you made reference in replying to Senator Hollett, there is reference in effect to the Criminal Code, which is an act of Parliament, which would include treason. Are there not instances under the Criminal Code, or some other statutes, pursuant to which a conviction leads to certain consequences in terms of dollars or other effects? When under this bill you vacate the conviction, does that mean that retroactively you vacate the consequences of the original conviction on a technical basis?

Mr. Hollies: No sir.

The Chairman: Because in the Senate, Mr. Hollies, a question was raised as to what was meant by vacating the conviction.

I forget which senator raised that point.

Senator Urquhart: It was Senator Choquette, who said it would be erased.

The Chairman: The question was as to what specifically was meant by the phrase vacating a conviction.

Mr. Hollies: The question, Mr. Chairman, was indeed posed to the Department of Justice.

The Chairman: Honourable senators, the phrase "vacates the conviction" appears in clause 5, paragraph (b), on page 3.

Mr. Hollies: As I understand the thrust of your question, sir, the first portion of it is whether the vacating is retroactive.

In my view it is not. I think I am on safe grounds in saying that is the accepted interpretation.

This has certain practical consequences when you consider a conviction under the Criminal Code for dangerous driving, which may have resulted in the provincial authorities suspending a licence to drive. In my opinion that suspension is valid and will remain valid. Notwithstanding the fact that there may be a subsequent pardon affecting the conviction, it does not affect the consequences which have flowed from it. It has no retrospective effect.

Its effect is that from the grant of the pardon it is deprived of force and effect in law.

A number of examples can be given. Under section 654 of the Criminal Code there are certain disabilities as to holding office under Her Majesty, contracting with Her Majesty, and the like, which are attendant upon what might generally be called frauds upon the Government.

Those who have been convicted under sections 102, 105 and 361 of the Criminal Code. Upon a grant of a pardon those disabilities are from that time removed.

In a small different sphere, supposing I were convicted of drunken driving today, suffer my punishment, apply for a pardon in due course and am granted a pardon. It would not be open to the Crown, should I be foolish enough to commit the offence again, to treat that offence as a second offence. It would, however, be possible that quantum of sentence, as distinct from the laying of the information as a second offence, would be affected if the Solicitor General allowed the court to be informed that this was not a first offence.

Senator Fournier (De Lanaudière): A person convicted of having committed a cold blooded murder on the occasion of a holdup, for instance, should not benefit by this law. We should make an exception for the murderer.

We have been kind and generous to them when voting that they would not be hanged or killed. We should not go any further.

Mr. Hollies: With respect, Senator Fournier, the murderer is not eligible for a pardon under this bill because his sentence has not expired. The board is precluded from making inquiries in the case of an indictable offence until five years after completion of the punishment.

Whether it is capital murder or non-capital murder, that man is under a sentence of imprisonment for life. Even if he is paroled, according to the Parole Act, he is deemed still to be under his term of imprisonment. Accordingly, there is no eligibility for a murderer to apply for a pardon under this act. There could be an application for a free pardon on the ground that he was wrongly convicted, where his innocence has been subsequently demonstrated; or even the lesser pardon—what is often called the conditional pardon—under the Letters Patent constituting the office of the Governor General. I think in practice that no such pardon has ever been applied for.

Senator Prowse: The same thing would apply to the habitual criminal, would it not?

Mr. Hollies: Senator Prowse, declaring a person a habitual criminal is a matter of status and has been so found by the courts. It is not an offence. It is only in respect of an offence that you can apply for a pardon.

The Acting Chairman: Honourable senators, I am certainly not suggesting an amendment, but it might be useful to have Mr. Hollies, and through him the department generally, consider the desirability in due course of dealing with the subject matter of the phrase "vacating the conviction", because there are certain instances where it is retroactive. For instance, if a man has lost his driving licence it remains retroactive even if the conviction is vacated, as you said before. On the other hand, in certain instances, such as doing business with the Crown, it runs in the future and is not retroactive. So you have an ambivalent situation with respect to the phrase "vacating the conviction" and its consequences.

Mr. Hollies: I must have lacked clarity in my exposition, senator. I was attempting to say that the pardon is not retroactive at all. I was saying, for example, that the consequences which may flow from the provincial authorities' cancelling a driver's licence show that the pardon is not retroactive,—those consequences having occurred before the pardon took place. There is a similar situation with respect to the devolution of estates, where a person cannot benefit by his own wrongful act. If you take the case of causing

death by criminal negligence, an estate may vest otherwise than would have been the case had that offence not taken place, because the wrongdoer cannot benefit from it. If you make the effect of the pardon retroactive, you then reopen the estate to determine distribution.

The Acting Chairman: The point I am making is that we are accepting and incorporating in this bill a phrase which is not defined. I think it is certainly worthwhile drawing your attention to it for departmental consideration. I have no other purpose in mind.

Mr. Hollies: Very good, sir.

Senator Prowse: Mr. Hollies, I am of the same opinion as the Chairman with respect to having a

definition of that expression, and I believe other senators would also like to see it defined.

The Acting Chairman: We certainly would have no intention of holding up the bill, but it is worth consideration. Are you ready for the question, honourable senators? May I have a motion to report the bill to the Senate without amendment?

Senator Cook: I so move.

Hon. Senators: Agreed.

The Acting Chairman: Thank you very much, Mr. Hollies.

The committee adjourned.

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THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 5

TUESDAY, JUNE 16, 1970

*Complete Proceedings on Bill C-186,
intituled:*

"An Act to establish a commission for the reform of the laws of Canada"

WITNESSES:

Department of Justice: Honourable John N. Turner, P.C., M.P., Minister of Justice and Attorney General of Canada; Mr. D. S. Thorson, Associate Deputy Minister; Mr. J. W. Ryan, Director, Legislation Section.

REPORT OF THE COMMITTEE

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*.

Argue	Flynn (<i>ex officio</i>)	Méthot
Aseltine	Gouin	Petten
Bélisle	Grosart	Phillips (<i>Rigaud</i>)
Burchill	Haig	Prowse
Choquette	Hayden	Roebuck
Connolly, J. J. (<i>Ottawa West</i>)	Hollett	Smith
Cook	Lang	Urquhart
Croll	Langlois	Walker
Eudes	Martin (<i>ex officio</i>)	White
Everett	Macdonald, J. M. (<i>Cape Breton</i>)	Willis
Fergusson	McGrand	

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Tuesday, June 9, 1970:

"Pursuant to the Orders of the Day, the Senate resumed the debate on the motion of the Honourable Senator Martin, P.C., seconded by the Honourable Senator Smith, for the second reading of the Bill C-186, intituled: "An Act to establish a commission for the reform of the laws of Canada".

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Martin, P.C., moved, seconded by the Honourable Senator Smith, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative."

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, June 16, 1970.

(5)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 4.00 p.m.

Present: The Honourable Senators Argue, Aseltine, Burchill, Connolly (*Ottawa West*), Cook, Eudes, Fergusson, Gouin, Hollett, Langlois, Macdonald (*Cape Breton*), McGrand, Phillips (*Rigaud*), Smith and Urquhart. (15)

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; Mr. Pierre Godbout, Assistant Law Clerk and Parliamentary Counsel, and Director of Committees.

In the absence of the Chairman and on Motion of the Honourable Senator Urquhart, the Honourable Senator Phillips (*Rigaud*) was elected Acting Chairman.

On Motion duly put it was *Resolved* to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of Bill C-186, intituled: "An Act to establish a commission for the reform of the laws of Canada".

The following witnesses were heard in explanation of the Bill:

The Honourable John N. Turner, P.C., M.P., Minister of Justice and Attorney General of Canada;

Mr. D. S. Thorson, Associate Deputy Minister, Department of Justice;

Mr. J. W. Ryan, Director, Legislation Section, Department of Justice.

After discussion and on Motion of the Honourable Senator Cook, it was *Resolved* to report the said Bill without amendment.

At 5.20 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

DENIS BOUFFARD,
Clerk of the Committee.

REPORT OF THE COMMITTEE

TUESDAY, June 16, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-186, intituled: "An Act to establish a commission for the reform of the laws of Canada", has in obedience to the order of reference of June 9, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

LAZARUS PHILLIPS,
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS EVIDENCE

Tuesday, June 16, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-186, to establish a commission for the reform of the laws of Canada, met this day at 4.00 p.m. to give consideration to the bill.

Senator Lazarus Phillips (*Acting Chairman*) in the Chair.

The Acting Chairman: Mr. Minister and Mr. Thorson, may I on behalf of the committee bid you welcome here.

We have convened this afternoon, as you know, Mr. Minister, to consider Bill C-186 which has received second reading in the Senate and is now before the Standing Senate Committee on Legal and Constitutional Affairs. I assume with all the free time you have had at your disposal, you have had an opportunity to read every speech delivered in the Senate on Bill C-186.

Senator Aseltine: Including mine.

The Acting Chairman: Including Senator Aseltine's on the question of cost.

The Hon. John N. Turner, Minister of Justice: A very practical speech, senator.

First of all Mr. Chairman and senators, I apologize for being late. We had a number of matters to deal with, both in the other place and in connection with delegations concerning a number of current issues in our country. They held me up. They ranged from abortion on the one side to drugs on the other.

I am delighted to be here and I want to say first of all, in answer to your rhetorical question, that I did, as a matter of fact, read the speeches as they were delivered in the Senate. I do not know whether it would be presumptuous on my part to compliment the other place, as we call it, on the high quality of the speeches delivered and particularly on the research that went into the preparation of the speeches. I think I can say that they com-

pare very favourably with the speeches made in the House of Commons, and as a matter of fact they display more research. I am very grateful to all honourable senators who participated in the debate.

I am not going to repeat what I said both before our own committee on Justice and Legal Affairs and before the House of Commons on second reading, but I think it is quite clear that living as we are in a society which is being convulsed by rapid change, and a society which is being dominated by a crisis of authority or a crisis of legitimacy, as it has been called, where every institution is being questioned, whether it be the state, the family, Parliament, the political party, the church, business, labour—where everything is being challenged on grounds of relevancy, grounds of communication with people, grounds of reflecting contemporary morals or contemporary attitudes of law and order. The law has been caught in the crunch, because these institutions reflect legal realities, and in an age of change social problems have become legal problems and legal problems have become social problems. A good many of our social problems today are provoked by the law, and in certain cases by the rigidity of the law and the failure of the law to reflect current thinking and current attitudes. As a result, as I say, our social problems have become legal problems and our legal problems have become social problems. Therefore it is necessary for the law to reflect the changing structures and changing attitudes of society. Nowhere is this more important than in the realm of the criminal law which is clearly a federal matter, because it is within the criminal law that the fundamental values of life, liberty, reputation, pocketbook and safety are tested and sanctioned.

Law reform, therefore, is a very relevant exercise for a late twentieth century legislature. The question is then—what are our best institutions for law reform? Obviously the Parliament of Canada is the prime institution for law reform in its federal aspect, and there

is nothing in this bill that takes that primacy away from Parliament, because the policy of and responsibility for the institution of reform will remain with Parliament and with the Cabinet responsible to Parliament. But it has become quite clear that we cannot just hope to deal with the reform of the law on an episodic or haphazard basis. The Criminal Law Reform measure introduced by Mr. Trudeau when he was Minister of Justice responded to certain policy necessities and provoked policy initiatives. The Bail Reform Bill which I introduced in the House of Commons last week was a policy matter of the utmost importance.

We will be introducing in the next session of Parliament another major reform bill on various aspects of the criminal law. As you know, we are moving in the elements of public administrative law as well. However, these are episodic; these are to meet what have become current problems of great importance to the country; but we in the Department of Justice, the Cabinet, or the standing committees of either house of Parliament I suggest and submit to your committee, do not have the time to review the law on a continuous basis.

If this law is to pass, one of the first matters I would like to refer to it would be the reform of the Criminal Code, but the entire Criminal Code, not just its housekeeping aspects but general aspects that will involve policy for which some future Government and minister may have to take responsibility. I believe that the criminal law needs that type of scrutiny. I think there are other branches of the federal law that need the same type of scrutiny.

Now, how will it work? The commission will be an independent commission. I want to deal with some of the points that were brought up about its independence, particularly by Senators Haig and Flynn, but it will be an independent commission. The terms of the chairman, the vice-chairman and the other two full-time members will be up to seven years; it will be a fixed term during good behaviour. The two part-time members will have terms of three years.

The commission will decide its own program of study and research. It will submit that program to the Minister of Justice of the day for approval. The reason I believe it should submit a program for approval—that is to say, the items of study and research—is

that obviously, in order to remain a creditable institution, the Law Reform Commission has to deal with issues that the people, through the Parliament of the day, deem to be relevant. Nothing would hurt a Law Reform Commission more than to be dealing with problems that were not of some importance to the people.

So the commission has to submit this program to the minister, and the minister must approve it. Under the bill the minister also has the right to suggest priorities for study items that he would like added to the program, because he, being responsible to the Cabinet and to Parliament, has to respond to the people of Canada as to what a body paid for by funds given to them by the people of Canada should be studying. But that is the limit of the minister's control, the program, by way of suggesting priorities and by way of approval of the program itself.

The contents of the reports are completely within the jurisdiction of the commission, and the commission can go to the minister or to the universities, or the provinces, or other jurisdictions, to the legal profession...

Senator Aseltine: To the law societies?

Hon. Mr. Turner: ...to the law societies, the criminologists, the sociologists—any source—and the content of those reports is the business of the commission. The commission can submit reports, programs, interim or final, on topics from time to time to the minister, and the minister is bound to table those reports in Parliament. He cannot hide them; he cannot send them back. Moreover, if the minister has refused an item on a program, within the terms of the bill he has to report that refusal when he tables the report. In other words, the fact that the minister has had something to do with the content of the program, the agenda of reform, must be registered in Parliament.

I think that is quite clear from clauses 17 and 18 of the bill. Clause 17 reads:

The Commission shall each year prepare and submit to the Minister a report containing a summary of its activities under this Act for the immediately preceding year, in such form and containing such information with respect to any studies or other activities undertaken or directed by it as the Minister may direct.

Clause 18 reads:

The Minister shall, within fifteen days after

(a) the approval by him of each program for studies prepared by the Commission pursuant to section 12,

(b) the receipt by him of each report of the Commission submitted to him under section 16 on the results of any study undertaken or directed by the Commission pursuant to any program for studies described in paragraph (a), or

(c) the receipt by him of the annual report of the Commission, submitted to him under section 17,

or, if Parliament is not then sitting, within any of the first fifteen days next thereafter that Parliament is sitting, cause to be laid before Parliament a copy of such program or report, together with, in the case of a program, a statement indicating any item or items proposed by the Commission and not approved, and in the case of a report, such comments, if any, as the Minister sees fit.

In other words, the minister becomes responsible to Parliament for any interference, if you will, with the commission, but he can only interfere with the program, and not with the contents of the report and not with the contents of the research.

I know that Parliament has to approve the funds from year to year, but Parliament approves the funds for the C.B.C., and Parliament approves the funds for a lot of independent or quasi-independent organizations. The people would expect that the Minister of Justice would be responsible for the amount of money being spent, and we estimate that it will cost from \$250,000 to \$300,000 a year for the Law Reform Commission, to begin with. The commission is relatively small. We are not making a large commission, and if specialties are to be dealt with then the commission will contract out that work.

Senator Aseltine: I presume the minister read my speech?

Hon. Mr. Turner: Yes, senator, I read your speech, and that is why I addressed myself to this subject.

Senator Aseltine: I am afraid I have to disagree. I have been here 36 years, and I have never seen a commission that did not cost three or four times the original estimate.

Hon. Mr. Turner: We are not so skillful as are honourable senators in that sort of work.

Senator Aseltine: I hope that you can keep those costs down to somewhere near half a million dollars a year.

Hon. Mr. Turner: I hope we can, but I want to suggest to you...

Senator Aseltine: I am sorry; I should not have interrupted you.

Hon. Mr. Turner: No, it was a perfectly relevant question. But, in the Department of Justice we are not dealing with wharves, causeways, roads to resources, or Bonaventures...

Senator Connolly (Ottawa West): Or Meach Lake.

Hon. Mr. Turner: No. We are just dealing with the reform of institutions which demand only people. If you look at the budget of the Department of Justice, and at the social consequences that can be derived from law reform, you will then see that there is no other place in the total budget of Canada where the people get more bang for their buck than they do out of law reform.

Those are my initial observations, Mr. Chairman.

The Acting Chairman: With your approval, honourable senators, I should like to direct one question to the minister.

Mr. Minister, in the debate, and more particularly in your remarks, you have made it very clear that under clause 12 the powers and duties of the commission are subject to the direction of the Minister of Justice, but that the independence of the commission comes when it prepares its report and files it, and thereafter the publicity given to it is dealt with in the procedural manner you have indicated. I have read the evidence given before the committee in the other place, and I would like to say I concur in the statement—and I know that the members of the committee agree with me—that Mr. Thorson is to be congratulated upon the draftsmanship of this bill. Having said that I should like to direct your attention to clause 12(1)(b) on page 6 of the bill. I am wondering whether the drafting gives effect to what you have just said. The commission is given the right, it “may initiate and carry out—”. You have an initiation and a completion by the commission of the subject matters dealt with in paragraphs (c), (d)

and (e). You seem to draw a differentiation between the subject matters that are prepared and submitted to the minister from time to time, detailed programs for the study of particular laws.

In order to give effect to what you have said, it may be necessary in paragraph (b) to state "subject to the provisions hereinafter mentioned they may initiate and carry out...".

Hon. Mr. Turner: I am going to ask Mr. Thorson to reply to that.

As you have mentioned, the bill has been very ably drafted, not without assistance, in the sense that we had the opportunity of reviewing the English and Scottish acts, the New York State Law Reform Commission and the Ontario Law Reform Commission. Mr. Thorson, the Deputy Minister, Mr. Maxwell, and I had the opportunity of discussing the operation of these commissions under the statutes governing those jurisdictions.

We hope that what you find here, senator, are improvements on the earlier statutes.

Having said that, perhaps Mr. Thorson would deal with your point.

Mr. D. S. Thorson, Associate Deputy Minister, Department of Justice: Mr. Chairman, it might be helpful just to back up on paragraph (b) a little to explain the manner in which we visualize the commission will function.

First of all, this is an empowering section, at least as far as paragraphs (a) and (b) are concerned. Paragraphs (c), (d) and (e) are mandatory in their language.

Paragraph (a) authorizes the commission to receive suggestions for changes in the law leading to reform from any source whatever, including members of the public. It is a wide open mandate, in other words, to receive suggestions from whatever source for the reform of the law.

Paragraph (b) again authorizes the commission, to the extent that it needs such authority, to initiate and carry out or supervise, perhaps through the facilities of a law school or other like facility, any kind of research that it deems necessary for the proper discharge of its functions, bearing in mind the kind of functions that are dealt with in clause 11.

The Acting Chairman: Without the consent of the minister, Mr. Thorson?

Mr. Thorson: Yes, absolutely, sir, without the consent of the minister.

It is recognized that the commission may have to enter into research programs in order to ascertain the areas of real difficulty so as to come to some conclusion as to the kind of studies that should be included in a program.

For that purpose they may very well wish to examine into, for example, the legal institutions and systems of law of other jurisdictions apart from the federal jurisdiction in Canada before coming to any conclusion as to the matters that ought to be included in a program.

The Acting Chairman: And that can be done without the direction or concurrence of the minister?

Mr. Thorson: Yes sir, it can.

The Acting Chairman: Then the direction and concurrence of the minister is related to "municipal" activities, as it were, as distinguished from non-Canadian activities?

Mr. Thorson: Yes.

The Acting Chairman: That is somewhat by way of modification, is it not, of the observations you, Mr. Minister, have just made?

Senator Aseltine: There would not be any limit.

The Acting Chairman: I am not suggesting it should not be done that way, but I simply draw your attention to it as a matter of phraseology, that there is a very important distinction.

Hon. Mr. Turner: Well, I accept that.

The Acting Chairman: Incidentally, you might find yourself in the interesting position of having an appropriation for the annual activities of the commission where its expense may be in excess of its appropriation because you have given it the authority under (a) and (b), unless you make it clear that its activities under (a) and (b) might be within the framework of the appropriation. I am not suggesting an amendment; I am merely calling your attention to it.

Hon. Mr. Turner: I would say that all money expended would have to be within the scope of the appropriation.

The Acting Chairman: Of course, but I again say that the Leader of the Government in the Senate (Hon. Mr. Martin) seemed to

emphasize, as you did, the fact that the activities of the commission were conditioned, circumscribed and informed by the Department of Justice through its minister, whereas under (a) and (b) this is not quite so.

Hon. Mr. Turner: We can look at the words used:

may initiate and carry out, or direct the initiation and carrying out of such studies and research of a legal nature as it deems necessary for the proper discharge of its functions.

Its functions relate to the program, or the preparation of a program. I think you have to read it within the...

The Acting Chairman: If you are satisfied with it, I have done my duty by drawing your attention to it.

Hon. Mr. Turner: We have tried to draw the balance between an independent commission and yet some responsibility to the people of Canada for what they are doing. Allan Leal, the Chairman of the Ontario Law Reform Commission, disagrees with us, but we found, on the basis of talking to the Lord Chancellor in England and the chairmen of the two law commissions there, that a creditability with the people and a creditability with Parliament was a necessary balance to the independence that they both enjoyed. I am sure the Ontario Law Reform Commission could not survive for too long if instead of dealing with landlord and tenant they were off worrying about the rule about perpetuities.

The Acting Chairman: I can quite see the necessity for (c) to (e) inclusive; but I have made my point, and if you are happy to live with it as is, it is perfectly all right with me. Are there any questions, honourable senators?

Senator Aseltine: I believe that I was the only speaker in both chambers who took any strong objection...

The Acting Chairman: Forgive me, Senator Aseltine, but the minister points out to me that there is a vote in the other house.

Senator Aseltine: I could probably ask my question before you are needed.

Hon. Mr. Turner: If I do not go there you may find when I come back I am not the minister!

The Acting Chairman: Some of us would like you to go, Mr. Minister.

Hon. Mr. Turner: Could we adjourn?

the Acting Chairman: No, I think we will carry on.

Senator Aseltine: It might be half an hour before they call the vote.

The Acting Chairman: May we not carry on with Mr. Thorson?

Hon. Mr. Turner: Perhaps Mr. Thorson could carry on.

The Acting Chairman: Yes, he can answer any questions that may arise.

Senator Urquhart: We will see the minister in the morning at 10 on another matter.

Senator Hollett: He may not come back.

Hon. Mr. Turner: Oh, I will be back.

The Acting Chairman: Shall we suspend with the question of expense?

Senator Aseltine: I would like to ask a question of the minister.

The Acting Chairman: May we, therefore, honourable senators, suspend Senator Aseltine's point and deal with the bill itself and any observations we may have to make with respect thereto? After all, we do have our duty in committees to deal with the form of the bill as such. I do not think you would mind, Senator Aseltine, if we proceeded with the form of the bill.

Senator Aseltine: I have no objection.

The Acting Chairman: Does the form of the bill, as we move along, meet with your approval, honourable senators? Shall I read the sections and get reactions or shall we assume that the phraseology of the bill is agreeable to the members of this committee? Are there any suggested amendments or any questions for clarification such as I directed to Mr. Thorson, that honourable senators would like to make?

Senator Cook: If there are no questions, I move to report the bill as is.

The Acting Chairman: I would rather wait until the minister returns before reporting the bill. Once we report the bill, we are more or less *defunctus officio* as far as the deliberations of the Committee are concerned.

Senator Hollett: If we pass this bill are we going to need another minister?

The Acting Chairman: No.

Senator Hollett: The Minister of Justice is carrying a load in the office already and this is going to give him a lot more work.

The Acting Chairman: Quite to the contrary. May we have Mr. Thorson deal with that?

Mr. Thorson: I would think this commission would be of very considerable assistance to the Minister of Justice in the discharge of his duties. There are many areas of the law where, practically speaking, it is virtually impossible on a day-to-day administrative basis to come to grips with areas where changes in the law are clearly needed. The kind of resources that can be brought to bear, the study that must precede the formulation of change, are simply inadequate for the task. Rather than be a burden to the minister in terms of having to cope with the implementation of the committee's report, I would have thought that it would work the other way around.

Senator Hollett: This is new work.

Mr. Thorson: Yes.

Senator Hollett: He has not had to contend with this before.

Mr. Thorson: Of course, a great deal of law reform work is done now year by year within the department.

Senator Hollett: I know that.

The Acting Chairman: The point was raised by Senator Hollett, Mr. Minister, that instead of relieving you of a responsibility, the subject matter of the bill and assigned to the commission that this will be increasing your duties because you must clear this as to the type of work to be done under section 12. He thought this would be increasing your work.

Senator Hollett: I was wondering if you were not carrying a burden enough now as Minister of Justice of Canada. You do not have much spare time. This is setting up another commission which will be bringing recommendations to you every day or week which you will have to study.

Hon. Mr. Turner: I do not think so. What happens in practice with the other commissions and what I would expect would happen

here is that the chairman would see the Minister of Justice of the day not more than once or twice a year on the matter of the program. Once the program was determined that would be the end of it. That is what happens as between the Lord Chancellor in the United Kingdom and Sir Leslie Scarmon of the English and Welsh Law Reform Commission. That is what happens between the Lord Advocate of Scotland and the Chairman of the Scottish Law Reform Commission, and that is what happens, I understand, between Mr. Leal and Mr. Wishart in Toronto. Mr. Wishart does not have the power of direction which, with great respect, I think is a weakness in the legislation. The program is then determined, say, a revision of the criminal law or of the Canada Evidence Act—can you come up with an evidence act that in its criminal law aspects has some consistency with provincial evidence acts? Once that is developed the commission has a job ahead for two or three years. I do not anticipate, senator, this being much of a burden. The commission for its success depends very much on the personality of the chairman.

Senator Burchill: As a layman, I take it that the chief object of the commission is study and research on matters to be initiated by them. Are they going to choose the matters upon which they are going to make the study?

Hon. Mr. Turner: Primarily, yes, subject to the approval of the Minister of Justice of the day and subject to the Minister of Justice being able to suggest items to be included in their program,—matters of special priority, as Mr. Thorson reminds me, within the terms of that section. Subject to that, the commission is on its own.

Senator Burchill: Then the report is brought into the department of the minister and, if approved, legislation is drafted in the department? Is that it?

Hon. Mr. Turner: There are one or two ways of doing it. A report can come in in general terms with recommendations, and it is sent to the minister. Under the bill, he has the duty to table it in Parliament. It then becomes the property of the people of Canada, through Parliament, through both houses. Then the Government has to take a position eventually on what to do with the report. Conceivably, it could reject the report. Conceivably, the Minister of Justice could say, "Fine, I believe this is a very useful

suggestion for reform and I will introduce legislation and incorporate the suggestions." Or the commission might—and this is what has happened in the United Kingdom and in some jurisdictions—the commission might have its own draftsman and accompany its report by a draft statute. This has the benefit of rendering more precise the wording of the report and shortening the legislative problems for the Government. But that is only a draft statute appended to a report. The Government need not take any responsibility for it. Parliament may decide of its own motion, through a standing committee, either of the Senate or of the House of Commons, to opt to implement that report. The Minister of Justice or the Government may decide to, or they may not. Once a report is tabled it becomes the property of the people of Canada, but it only becomes a legislative measure if the Minister of Justice of the day incorporates it into the Government program.

Senator Burchill: Thank you very much.

Senator Aseltine: Mr. Chairman, when I was interrupted by the bell, I was stating that I believe I was the only speaker from both houses of Parliament who took any strong objection to this bill. I read all the speeches made in the other place and those that I did not hear in the Senate I read, and I found no one who made any really strong objection to the bill.

Therefore, I thought I should say something about my own views. So I spoke on the second reading. I said that I was all in favour of law reform when absolutely necessary, but took strong objection to the setting up of a permanent law reform commission at this time. I stated that such a commission would cost a great deal of money to operate and that the Government should not spend money now, or in the near future, when we are presently fighting desperately to control inflation and all governments—federal, provincial and municipal—are cutting expenses to the bone.

That was when I gave my estimate of the expenses of this commission. I did not think we should spend that money now.

Why has this law reform business reached such proportions, all of a sudden? I know that the minister promised, during his election campaign, that he would bring in a bill of this kind. But I was not expecting a bill like this, to create a permanent commission, that it would be brought in now when we are

trying to get away from spending so much money. We are postponing this and postponing that and now, all of a sudden, we bring in this bill to set up this commission, which is going to cost us millions of dollars, before it is all through with.

That was my main objection, and then I went on to say that we had 365 members of Parliament and 102 senators to do reform work of this kind. The minister has answered that point for me and I will not go any further on it.

I still think that the Senate and the House of Commons can do a great deal of this work themselves, by setting up either a joint committee of both houses, or a Senate committee on law reform. I hope and pray that this commission will not do a lot of tinkering with our laws.

I hope the minister will check very carefully all that they are trying to do, and prevent anything like that happening, because these laws have performed very satisfactorily over the years. As I said, I have been in practice for 50 years and I have never found very much difficulty in interpreting the laws I had to deal with. I hope there will be no tinkering done in the future, and that the minister will give it very, very careful attention.

Right at this moment I wish to say that I am very pleased that we have as Minister of Justice, as long as this Government is in power, a man like the present minister who is energetic and apparently knows the law.

Hon. Senators: Hear, hear.

The Acting Chairman: He does, I can assure you of that, Senator Aseltine.

Senator Aseltine: I have another question.

Hon. Mr. Turner: At this stage I shall leave for the vote in the House of Commons.

The Acting Chairman: Well, we may be passing the bill while you are away. If we do so, we will get the message to you.

Hon. Mr. Turner: I have often learned, senator, that when I am away things move faster.

Senator Aseltine: I do not want the bill to be passed without asking this question which was sent to me by Senator Flynn.

The Acting Chairman: As you will notice, Senator Aseltine, I am holding up the motion

of Senator Cook until you have a full opportunity of asking any questions you want to ask.

Senator Aseltine: It has to do with the power to review provincial legislation and recommendations for its improvement and all that kind of thing.

The Acting Chairman: I think perhaps Mr. Thorson could answer that.

Senator Aseltine: Well, I would like to read the question as sent to me by Senator Flynn.

The Acting Chairman: Please do.

Senator Aseltine: Senator Flynn would like me to ask the minister whether the Federal Law Reform Commission would have any power to review provincial legislation and make recommendations for its improvement. Could the commission on its own initiative embark on a study of provincial laws with a view to suggesting how the latter might be improved? That, Mr. Chairman, is Senator Flynn's question.

The Acting Chairman: Before I ask Mr. Thorson to answer that question, Senator Aseltine, and that does not necessarily mean that it will not be supplemented by the view of the minister on his return, could I draw your attention to clause 11 which Mr. Hopkins has specifically drawn my attention to.

Senator Aseltine: This question was raised in the house as well, and in the Senate too.

The Acting Chairman: Let us first of all look at clause 11, Senator Aseltine, on page 5. There it states:

The objects of the commission are to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada...

Now, the laws of Canada surely would not be the laws of the provinces of Canada, but having said that, I would hand the question over to Mr. Thorson for the present. If you are not completely satisfied with that, we will have to wait for the return of the minister.

Mr. Thorson: Thank you, Mr. Chairman. We did, I think, in drafting this particular bill, take particular care to make sure that in no way could the recommendations of the Law Reform Commission of Canada transgress the jurisdiction of the provinces. As the chairman correctly points out, clause 11 of

the bill is confined to the "laws of Canada", which takes its meaning from the British North America Act, and as that expression is used in section 101 of that Act.

In response to the particular question whether the commission could review and make recommendations for changes in provincial law, the answer has to be an emphatic no. It could not do that. The sole degree to which the commission could involve itself in a study of provincial law would be within the sense of paragraph (b) of clause 12(1).

Senator Aseltine: I think that is the one that was proving troublesome to Senator Flynn.

Mr. Thorson: Clause 12(1)(b) page 6 of the bill, as I tried to indicate earlier, is merely an empowering provision which gives the commission the power to engage in studies and research projects of a legal nature in order to enable it to carry out its duties, fully appreciating that, for example, in any review of the Canada Evidence Act, it might be very necessary to study various provincial evidence acts. I think that would go without saying. Now, there is a further area, but before moving to that further area, I should say that that is the limit of its authority here.

Senator Aseltine: But why does it say this, then:

...including studies and research relating to the laws and legal systems and institutions of other jurisdictions in Canada or elsewhere;

Mr. Thorson: Yes, sir, that is merely the power to initiate the studies necessary to formulate the program that it proposes to recommend to the minister. The program that can be recommended must relate to the laws of Canada. Indeed, no other program could possibly be put forward or approved by the minister.

Senator Aseltine: Then why clause (b) at all? It raises doubt in my mind and in the minds of others who have read this bill.

Mr. Thorson: The sole purpose is to enable the commission to conduct studies into the laws and institutions of other jurisdictions, because it may be relevant to know, for example, that the Evidence Act of British Columbia or Saskatchewan contains a provision of a certain nature, or that the criminal laws of Sweden have taken a particular approach that is of interest to us in dealing with a similar subject matter. But I repeat,

this is again merely empowering the commission, and does not go to the kinds of recommendations that it can make. The matter of recommendations is very explicit in the bill; it is specifically tied to recommendations relating to reform of laws of Canada.

Senator Cook: This is for the proper discharge of its functions.

Mr. Thorson: Yes, you are carried back to clause 11, that is right.

The Acting Chairman: Senator Aseltine, if Mr. Thorson will allow me to supplement what he says—clause (b) deals with a research aspect, which includes “studies and research relating to the laws and legal systems and institutions of other jurisdictions in Canada or elsewhere”. The research of a legal system, of the laws, certainly does not give a commission the authority to abrogate or modify the laws of any of the provinces. Once a report is given, as indicated by the minister, the report is merely one that the minister of Justice is obliged to table in the house. The implementation of such a report would have to be by the Parliament of Canada, and to the extent that the Parliament of Canada, for the sake of argument, would implement a report which would violate the British North America Act and the Constitution of the country, it would be an invasion of the rights of the provinces and, hence, unconstitutional.

Senator Aseltine: When I first read this paragraph I wondered just how far it was intended to go, because some people have mentioned that they were afraid there was something in this bill that gave this commission the power to recommend changes in the laws of some of the provinces—the civil law of Quebec, maybe, and others.

The Acting Chairman: Of course, Senator Aseltine, as soon as you read a phrase in a federal statute, “with respect to studies and researches relating to . . . other jurisdictions in Canada”, one’s mind is properly and legally alerted to the necessity of making sure that it does not invade the jurisdiction of the provinces.

Senator Aseltine: I think that was the reason for the question.

The Acting Chairman: Yes, I, for one as a lawyer, would strongly support Mr. Thorson, that under this statute there could not possibly be an invasion by this commission of the constitutional rights of the provinces.

Senator Aseltine: And Mr. Thorson backs you up on that?

The Acting Chairman: Would you back me up on that?

Mr. Thorson: Yes, I do indeed fully.

The Acting Chairman: Would you, Senator Aseltine, in view of the absence of the minister, be satisfied with the answer that Mr. Thorson has given you in reply to this question?

Senator Aseltine: But the minister has not answered my other question. I asked why it was thought necessary to bring this bill before Parliament at this time, when it was going to cost a great deal of money and when we are not spending any more money than is absolutely necessary? All governments are cutting down expenses to the bone.

Senator Cook: In that connection I should like to ask a question of the witness, and it is a twofold question.

The Acting Chairman: I should like to dispose of Senator Aseltine’s point first. I would have thought that the introductory remarks of the Minister of Justice indicating that in his opinion there has been an acceleration of changes in the climate of the country generally with respect to all of our institutions embracing church, state, economics, labour unions and so on, and that all of these almost revolutionary changes have taken place—after all, senator, when you and I went to law school. . .

Senator Aseltine: But my point concerns the control of inflation. My view is that this will interfere with what they are trying to do in controlling inflation.

The Chairman: In any event, I would have thought that the minister has answered your question, but if you want him to return then I will not put the matter to a vote until you are satisfied.

Senator Cook: In that connection I was going to ask, Mr. Chairman, how long law reform commissions have been established in other jurisdictions, and if, in an exchange of views with those other jurisdictions, the department has formed any opinion as to the value of those commissions.

Mr. Thorson: In Canada, senator, I believe the original commission was the Ontario Law Reform Commission. I am subject to correc-

tion, but I believe it has been functioning for between five and six years—perhaps a bit longer. My memory is not precise on the point. The law reform commissions or equivalent bodies in other provinces are newer, but the experience with them has generally been a happy one. It is considered that they have been productive of useful changes, but this depends, of course, upon the personnel and on the ability of the chairmen and members.

There is one comment I might make which reflects obliquely on the point Senator Aseltine was making, and that is that an investment in a law reform commission can turn out to be a very wise one financially. The moneys that can be saved in a long term sense can be significant, in terms of sweeping away obsolete laws and practices and, in effect, achieving a streamlining of expenditure techniques and procedures in areas where the commission deals with legislation involving the expenditure of money.

Senator Aseltine: If that is so important why have we been so long in bringing this kind of legislation before Parliament?

Mr. Thorson: That is a very good question, but I am not sure that I am competent to answer it.

Senator Connolly (Ottawa West): That is a policy question. But would you say, Mr. Thorson, that the work of this commission is to facilitate and perhaps reduce the cost of the periodic revision of the statutes?

Mr. Thorson: I would hope that it would have an indirect bearing on that, Senator Connolly. As you probably know, up until now the revision of the statutes has been a rather haphazard thing. The gap between the 1927 revision of the Statutes and the 1952 revision is 25 years. The length of time between 1952 and 1970, when we hope to see the new revision, is another long gap. It is much too long a gap. The statutes in the meantime have become cumbersome and difficult to use. One thing that we hope will be achieved is the avoidance of the need to have a repetition of this. We do not want to see again the kind of time lapse between revisions of the statutes we have seen in the past. The entire statutes of Canada are being placed upon magnetic tape, and this will mean a great deal in terms of our ability to update them and to prepare office consolidations quickly. This should avoid the need for long periods of time between revisions.

Senator Urquhart: They should be revised every ten years.

Mr. Thorson: This is exactly what we aim to do, with no longer an interval.

Senator Langlois: Is it anticipated that in the long run we will eliminate the periodic revisions we have used in the past?

Mr. Thorson: With the use of modern technology we will be able to produce up-dated statutes for the convenience of the legal profession, the judiciary and the legislature very quickly indeed.

By that I mean that if in a given session of Parliament there are amendments effected to the Aeronautics Act or the Canada Shipping Act, for example, they ought to be able to be incorporated into an up-dated office consolidation of the statute very quickly. One concept we are considering is the use of loose-leaf editions. This will enable the up-dated statute to be available to members of the public very quickly indeed.

There is a real breakthrough in this respect with the use of magnetic tape.

Senator Burchill: Again as a layman I would like to ask Mr. Thorson if this commission would have the power, if I may use the expression, to tidy up the statutes?

In my experience in the Senate over the years I have heard many speeches by lawyer senators critical of the fact that the statutes need tidying up, that there are amendments all over the place. When referring to a law it is found that there has been another law enacted somewhere else.

Senator Roebuck was most critical on several occasions.

Mr. Thorson: We do not visualize that the commission's task will be to do what the Statute Revision Commission's task has been historically.

In other words, its task will not be to consolidate periodically the statutes and to publish them in revised form. It will, however, be able to carry out, we hope, a very useful function in the cleaning up of obsolete statutes which are no longer required to be carried in the law, and provisions that are anomalous or do not make sense and that cannot be reconciled with existing, live law. We anticipate that the commission will be able to do that very usefully.

However, in terms of the physical task of compiling the entire body of the statute law, no. We anticipate approaching that task in another fashion.

Senator Aseltine: Have you any information, Mr. Thorson, that you could give us as to when the revision of the statutes will be completed?

In every law office that I have been in, particularly in my own office, we have great difficulty in running down a point of law to find exactly what it is. We have to go back for years and years.

Mr. Thorson: Senator, I know exactly what your problem is. I will ask Mr. J. W. Ryan of the Department of Justice to comment on this. He is the Director of the Legislation Section and has had more to do with the preparation of the revised statutes that is now under way than any other member of the department.

Mr. J. W. Ryan, Director, Legislation Section, Department of Justice: Mr. Chairman, with reference to the point of timing of the revised statutes, the position now is that the manuscript from the Statute Revision Commission is in the hands of the printers.

The process under way at the moment is converting the language of the manuscripts to machinery language—I am taking a little time to answer the question, because there is a difficulty involved—and this magnetic tape is now being processed through composing equipment that runs on a computer command basis to page proofs, which we are presently reading. The printing program or schedule has run behind time about, at the moment, nine months.

There are two reasons for this. First, when we began nobody in Canada, the United States or elsewhere in the world had ever written software or computer programs for the bilingual formatting of pages. We therefore had to begin by creating that program ourselves, which it has taken about nine to ten months to create and test out. At the moment the whole of the printing process has been dependent on the creation of this software, which once created will be available generally speaking in Canada to all bilingual formats.

We have closed off the date of the contents of the statutes as of December 31, 1969, and this present Parliament has given us new manuscript in the acts presently in and coming out of Parliament. The final putting

together of volumes will take place later this year. It cannot take place before the fall of this year, although the commission may be able to report somewhat earlier than the statute roll can be available to the public generally. At the moment we are contemplating 1970 statutes with the report of the commission in the fall to the Government, and with publication and general circulation in the fall after that. We are totally dependent upon this new technology, and once it is completed we will have considerable time for the future, but at the moment we have to suffer the pioneering pains.

The Acting Chairman: Thank you, Mr. Ryan.

Senator Connolly (Ottawa West): Perhaps the minister would like to comment on this. I should like to go back to a question asked by Senator Aseltine and direct attention to clause 11(b):

The objects of the commission are to study—without limiting the generality of the foregoing,

(b) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions;

To me this is a very important clause of the bill. I wondered whether the minister or Mr. Thorson, who was here for the earlier questions, would comment on that.

Hon. Mr. Turner: This is the first Law Reform Commission dealing with the laws of a federal state, but reflecting laws written in two languages and based on two separate legal systems. I therefore think it is important that the federal statutes be equally articulate in each language and reflect the legal institutions evolving from those two separate systems.

In recent years, in the Department of Justice we have changed our drafting techniques. Mr. Thorson and Mr. Ryan could speak more authoritatively than I can, but let me just try to describe it to you. A statute used to be drafted in English primarily and then translated into French. Often the translation did not reflect the meaning, because it was a literal translation and did not reflect the civil law concepts within the law of the Province

of Quebec because they were translations of common law concepts. This got us into a good deal of trouble in the Crown Liability Act, the crown's liability for tort. There is no such thing as a tort under the law of Quebec. There was no comparison within the statute as to the different consequences flowing from delict under the civil law as from tort under the common law.

The law of personal property in Quebec differs from the law of personal property in the other provinces—the law of real property, the law of immovables. There is no such thing as a mortgage. A hypothec is the same concept but different. There is no such thing as a trust.

Senator Aseltine: How can you put it into French then?

Hon. Mr. Turner: What we are trying to do now is to take a policy memorandum approved by cabinet and have the legislation drafted separately in each language and reflecting each system of law, then have the two versions carried as reflecting the meaning of the policy memorandum of the Government. Therefore, we have to find words in each version that give the same legal consequences deriving from different legal institutions.

Senator Aseltine: Will the commission have anything to do with that?

Hon. Mr. Turner: The commission has to study and keep under review on a continuing and systematic basis the statutes, et cetera, of Canada, making recommendations for their improvement, modernization and reform, including the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions.

Take the criminal law, the law of theft, possession. It may mean something different under the common law in the English-speaking provinces and under the civil law for civil law purposes. When the property passes—even a criminal law under complete federal jurisdiction deals with different concepts of property in the law of theft, and so on throughout the code. We have to insure, senator, that a federal statute has the same meaning in Quebec as it does in the other provinces.

Mr. Thorson has just handed me further examples. The Expropriation Act, which deals with the taking of property involves concepts of real property. We hope we have achieved in the Expropriation Act, which was passed by the Senate and which is now law, wording in those two separate versions which will reflect the same meaning deriving from different legal concepts.

Also, section 3 of the Estate Tax Act. Marcel Faribault wrote a learned article and made speeches about this. The devolving of estates under provincial law in Quebec followed a different procedure and different substantive law than in the common law provinces. Section 3 of the Estate Tax Act reflected basically common law concepts. In its review of the statutes of this country, as commissioned by the Government or under its own motion, one of the aspects that any federal law commission should have in mind is insuring that whatever legislation was suggested properly reflected two systems of law, two separate sets of concepts in certain branches of the law so the same meaning came out of each version.

The Acting Chairman: As far as I am concerned, as I indicated in the Senate, this is one of the most exciting parts of the bill. Incidentally, in answer to Senator Flynn, through you, it emphasizes the response you received from Mr. Thorson, that the essence is to protect the provincial jurisdiction and not to invade it, and the necessity of harmonization that you get under section 11 accentuates the protective aspects as developed by the minister.

Senator Aseltine: I think he would be satisfied with the minister. Why was it so important, when we were fighting desperately to control inflation, that we should go to all the expense which this law commission will cause the taxpayers?

Hon. Mr. Turner: Let me give two types of answer to that and I think they are both relevant. I tried to indicate in my opening remarks, that because of the rapidly changing structure of society, I felt that a law that is responsive to the need for changing structures and needed legal reform, a law that was responsive, and therefore credible, and therefore enforceable, is something that any society must cast high in its list of priorities.

When we are talking about spending money, we are not talking about how much money we are spending, but about the priorities for that spending. In an age of confronta-

tion, in an age of dissent, in an age of generation gap, in an age where technology is moving so quickly, unless our legal system reflects these changes technologically, in terms of communication, in terms of generations, then our society will not respond and the free process, the rule of law, will be very difficult to maintain.

The second type of answer I wish to give you is this. In terms of what we are trying to accomplish, particularly in those areas of federal jurisdiction like public administrative law, where we are talking about citizens rights against the state, when we are talking in terms of the criminal law, of the citizens rights as against his neighbour and as against the state, we are really not talking about much money. That reform bill which I introduced last week in the House of Commons and which honourable senators will have to deal with, will change fundamentally the whole concept of the enforcement of the law in Canada. Yet it will not cost the taxpayer one cent, except the time of the men and women in the two houses of Parliament and of the witnesses who come to testify. Yet its consequences for the people of Canada are immense.

What are the costs here? We are dealing with a commission of six men and women, a very small commission for a country with two systems of law and ten provinces, and the second largest land mass on the face of the globe. We kept it small deliberately, because we could not hope to cover every kind of expertise on such a commission. We kept it small so that the personnel of that commission would reflect the priorities of legal reform from time to time. Right now, I think that they are criminal and evidential. In three or four years they may well be public administrative law, or the Bankruptcy Act or the Corporation Act. The personnel will reflect those priorities, and if the commission needs expertise, instead of making it a large commission, it goes out and contracts for the men and women who have that expertise, either within or without the law. That was done deliberately to make this as economical as possible.

Senator Aseltine: You have almost convinced me that I should vote for the bill.

Hon. Mr. Turner: Good.

The Acting Chairman: Before you change your mind, honourable senator, may we put the question?

Senator Hollett: That being settled, may I suggest something? I do not like section 12, subsection (1)(a), on page 6. It says: "may receive"—that is "may", mind you—"may receive and consider any proposal for the reform of the law that may be made or referred to it by any body or person." In the first place, the word "may" gives the commission the absolute right to say it will not listen to any such representations. Then, the words "any person" mean that the commission will be swamped with applications from people all across Canada, abortionists and everybody else. I think that should be reworded in some way or other.

The Acting Chairman: Senator Hollett, the receipt of the material and its consideration surely is not of fundamental importance, because all that the commission need do is note its receipt of the communication.

Senator Aseltine: And do nothing about it.

The Acting Chairman: And may not even bother to consider it.

Senator Hollett: I know, but that gives them a terrific power. They do not have to do anything.

The Acting Chairman: Senator Hollett, today without a statute, anybody can write to members of Parliament. Look at all the material that you get. Anybody can write in to anybody.

Senator Urquhart: You do not need to have a statutory provision to send a submission to any minister of Government. That is why "may" is there.

The Acting Chairman: Honourable senators, may I put the question? It is moved by Senator Cook, seconded by Senator McGrand, that we report the bill without amendment.

Hon. Senators: Agreed.

The committee adjourned.



Second Session—Twenty-eighth Parliament
1969-70

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

The Honourable LAZARUS PHILLIPS, *Acting Chairman*

No. 6

WEDNESDAY, JUNE 17, 1970

First Proceedings

on

"Procedures for the Review of Statutory Instruments"

WITNESSES:

Department of Justice: The Honourable John N. Turner, Minister of Justice and Attorney General of Canada; Mr. D. S. Thorson, Associate Deputy Minister.

APPENDIX A

Letter from the Honourable D. S. Macdonald, P.C., M.P., President of the Privy Council, and related appendices.

THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman.*

Argue	Flynn (<i>ex officio</i>)	McGrand
Aseltine	Gouin	Méthot
Belisle	Grosart	Petten
Burchill	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly	Hollett	Roebuck
(<i>Ottawa West</i>)	Lang	Smith
Cook	Langlois	Urquhart
Croll	Martin (<i>ex officio</i>)	Walker
Eudes	Macdonald (<i>Cape</i>	White
Everett	<i>Breton</i>)	Willis
Fergusson		

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of the Proceedings of the Senate, Thursday, May 7th, 1970.

Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Martin, P.C., seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Legal and Constitutional Affairs be instructed to consider and, from time to time, to report on procedures for the review by the Senate of instruments made in virtue of any statute of the Parliament of Canada, and to consider in connection therewith any public documents relevant thereto.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

WEDNESDAY, June 17, 1970
(6)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10.00 a.m.

Present: The Honourable Senators: Argue, Connolly (*Ottawa West*), Eudes, Fergusson, Flynn, Gouin, Haig, Langlois, Macdonald (*Cape Breton*), McGrand, Méthot, Phillips (*Rigaud*) and Urquhart. (13)

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

In the absence of the Chairman and on Motion of the Honourable Senator Urquhart, the Honourable Senator Phillips (*Rigaud*) was elected Acting Chairman.

On Motion duly put it was *Resolved* to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of the following Motion by the Senate: "That the Standing Senate Committee on Legal and Constitutional Affairs be instructed to consider and, from time to time, to report on procedures for the review by the Senate of instruments made in virtue of any statute of the Parliament of Canada, and to consider in connection therewith any public documents relevant there to."

The following witnesses were heard:

The Honourable John N. Turner, P.C., M.P.,
Minister of Justice and Attorney General of Canada;
Mr. D. S. Thorson, Associate Deputy Minister,
Department of Justice.

A letter and related appendixes "A" and "B" from the Honourable D. S. Macdonald, P.C., M.P., President of the Privy Council, to Mr. Mark MacGuigan, M.P., Chairman of the House of Commons Special Committee On Statutory Instruments, was submitted by the Honourable John N. Turner and it was ordered that they be printed as appendix "A" to these proceedings.

At 11.15 a.m., after discussion, the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Wednesday, June 17, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, which was instructed to consider and report upon Statutory Instruments and relevant public documents, met this day at 10.00 a.m.

Upon motion, it was *resolved* that Senator Lazarus Phillips be appointed Acting Chairman.

Senator Lazarus Phillips (*Acting Chairman*) in the Chair.

Upon motion, it was *resolved* that a verbatim report be made of the proceedings and to recommend that 800 copies in English and 300 copies in French be printed.

The Acting Chairman: Honourable senators, we are here today to deal with the subject matter of the Third Report of the House of Commons Special Committee on Statutory Instruments, and we have with us, as you can well see, of course, our Minister of Justice and Mr. Thorson of the department. I am glad to take some of you away from the turbulent waters of the White Paper consideration and bring you into the placid harbour of a discussion of statutory instruments.

Senator Flynn: Mr. Benson will be grateful to the Minister of Justice for doing that!

The Acting Chairman: Perhaps you would be good enough to take over now, Mr. Minister.

Honourable John N. Turner, Minister of Justice: Mr. Chairman and honourable senators, first of all may I thank you for your invitation again on a subject of extreme importance. Again, might I be presumptuous enough to commend the upper house and the committee for instituting this study and deciding whether there should be some sort of scrutiny or comité de surveillance of the regulation-making power and regulations and

statutory instruments? It is something that has been close to my heart as Minister of Justice.

In the philosophical thrust that I am trying to bring to the department there are four objectives, to my mind. One relates to the subject I was talking about yesterday, Mr. Chairman—a more contemporary, flexible, enforceable, human criminal law. The second relates to an objective of trying to equalize access to the law for rich and poor, in procedure and in substance, in so far as it relates to the federal jurisdiction. The third is to try to bring the law up to date with technology, the computer, the ecological revolution in terms of what we face in threats to our environment—where the law really has fallen behind. And the fourth is to balance the rights between the citizen and the state.

C'est ce dernier qui nous intéresse, ce matin.

Pour l'instant, je vais énoncer, en français, un objectif. Mais, je crois qu'il convient avant tout de rétablir l'équilibre dans le rapport entre le justifiable et les dimensions mêmes et l'inaccessibilité du gouvernement ne doivent en aucune manière faire oublier ou diminuer davantage les droits justifiables. Il faut rebalancer les droits du citoyen contre les droits de la collectivité du gouvernement.

I believe that this remoteness of governmental institutions, the inadequacy of methods of appeal, the inadequacy of methods of even knowing what the law and the regulations are, are such that Parliament, in both its houses, would do well to review methods to enhance the rights of the citizen as against the state.

There are four aspects of the problem, as I see it. The first has to do with the enabling power that we find in statutes themselves, the enabling power which delegates the legislation or gives the minister or the Governor in Council or an agency the power to make regulations.

What is the breadth of that enabling power? What restrictions are placed on it at the drafting stage? That is where the problem first arises.

The second is, once the regulation is passed pursuant to an enabling power in a statute, what agencies or bodies are there available to review those regulations, to see whether they stay within the scope of the statute, within the scope of the enabling power, to see that they do not offend some principles of parliamentary procedure or natural justice, and so on. This is the problem that you are facing, the setting up of a scrutiny committee, such as has been recommended already in the House of Commons in the Third Report of the Special Committee on Statutory Instruments, of which I am sure you have taken parliamentary notice.

The Acting Chairman: Of course. We have had a debate on it.

Hon. Mr. Turner: I have read that debate, and I understand that you intend to call as a witness the chairman of that committee.

The Acting Chairman: We do, following you, Mr. Minister.

Hon. Mr. Turner: We have talked about the enabling power—and I will go into this in more detail—in the statute itself and the drafting of the statute; then the passage of the regulation and what aspects there are for reviewing that regulation. The third is the administrative tribunal that is set up pursuant to statute, or sometimes even pursuant to regulation. What are the rights of a citizen against the decisions of those tribunals?

The Federal Court Bill, which you will be receiving some time before the proroguing of the session, either in June or in September or October, sets out, I hope, the beginnings of a code of public administrative law providing methods for review of the quasi-judicial and judicial functions of the federal administrative tribunals.

The fourth aspect is: Are there any minimum rules of procedure of these administrative tribunals themselves? Should we have an administrative procedures act, along the lines of that enacted by the Congress of the United States; or should we have a council of tribunals act, along the lines of that enacted by the United Kingdom?

Those are the four parameters of the problem, as I see it. We are dealing primarily with

the power of Parliament to review regulations, but the other three aspects I want to submit to you are equally important, and we need really to achieve control by using all four levers so as to give the citizen new remedies against his Government and against the decisions of his Government.

Today I do not think any of us would argue that there is no necessity for delegated legislation, that regulation-making power is not necessary in a modern government, that you can do everything by statute, and that Parliament can be expected to oversee everything.

I know that honourable senators are well aware of the reasons. It is often a matter of urgency, where things have to be done quickly, and a regulation within the enabling power of a statute can bring the administrative process into action quicker than one could if one had to go before Parliament each time. There is a lack of parliamentary time. There is the need to experiment with legislation of an administrative sort, particularly in new fields like ecology, hazardous products, consumer legislation, and so on.

Now, I want to expand on this a little. The oldest reason given for the delegation of the power to legislate is urgency. I think Parliament has always recognized the need to make new laws with a speed not always available in Parliament. Therefore, Parliament has given power to make laws by way of regulation to other bodies—to ministers, to independent crown agencies, and so on. I believe also that the lack of parliamentary time is a valid one. We are all aware of the increase of legislative business that has come before Parliament, and as Government assumes more and more importance in the every-day life of a citizen—in trade and commerce, corporate affairs, labour matters, public health, pension plans, industrial incentives, broadcasting, languages, and so on—the time available for parliamentary consideration of all these myriad details of policy is no longer available. So Parliament gives the legislative framework for decisions that are delegated to ministers or other bodies by way of regulation.

I think we have to admit too that Parliament may be omnipotent, but it is not omniscient. Parliament may be supreme within the federal jurisdiction, but we cannot predict everything that is going to happen. For instance, Parliament cannot be expected to know what potentially dangerous drugs may come on the market, or what potentially dangerous consumer products may come on the

market, or what new technology in terms of transportation may do by way of threat of pollution to our shores and to some of the industries that depend on our waters. Because of the speed of events in the world we have delegated this by way of the regulation power.

There seems to have been a feeling abroad, and I have noticed it, that some decisions ought to be taken out of the political arena. I have noticed that Parliament attempts to defuse some areas of political controversy by establishing a quasi-independent or independent board or tribunal to deal with it. The Immigration Appeal Board is a pertinent example. These boards or tribunals, which are given a mixture of administrative, quasi-judicial and judicial powers, exercise these powers under a general policy set down under statute by Parliament, and they are supposed to be administered by a non-political tribunal or body thereafter—the National Energy Board, the Canadian Transportation Commission, the CRTC, and so on.

This has always posed a problem for me because one wonders about ministerial responsibility. I do not think you can ever take the politics out of political decisions. Somebody has to make a decision, and virtually every decision has a political connotation, for choosing between interests, between regions, in every decision someone makes. It sometimes disturbs me that there is insufficient ministerial responsibility or accountability to Parliament for some of the decisions that are made under delegated legislation.

The Acting Chairman: If I may interrupt you, it seems to be in reverse proportion to the size of the crown corporation—to wit, CBC and Canadian National Railways. There seems to be some responsibility in the minor tribunals, but the bigger they get the greater the divorcement.

Hon. Mr. Turner: This is a problem, Mr. Chairman and senators, for modern government. How to preserve the independence of some of these boards created by Parliament to administer a certain policy, granted by Parliament under statute, and yet preserve some accountability politically to the people, through a minister. That is in terms of policy, but when those boards are acting judicially, deciding rights between citizens or rights between interests, then the Federal Court Bill, I hope, will come into play to ensure that natural justice is fulfilled, that there has not

been any excessive jurisdiction and that the boards are exercising their jurisdiction. But there is a justification for delegated legislative power. Despite Lord Hewart and *The New Despotism*, this is a fact of modern Government and this is why you and I are here.

The House of Commons, the other place, has tried to suggest certain guidelines for restrictions on the enabling power, in the drafting of legislation, and also for the review of regulations passed pursuant to enabling powers of statutes.

I am not going to repeat what I said before a similar committee in the House of Commons, but perhaps, Mr. Chairman, your committee might at an appropriate stage take judicial notice of the proceedings of that committee. What I have said there is available to you, so I will not repeat what I did say there.

You will observe that this report has been accepted in substance by the Government. Yesterday in the House of Commons the President of the Privy Council made a statement to the effect that—I do not know whether you want me to summarize the statement or read Mr. MacDonald's statement.

The Acting Chairman: I think it would be very helpful if it could be read, Mr. Minister.

Hon. Mr. Turner: It is available in *Hansard* of the other place, but I will read the pertinent parts because I think this will outline the Government's position on this report, and a further document is going up to Cabinet to render it more precise.

We have agreed to implement most of the committee's recommendations, and the President of the Privy Council, Mr. Macdonald, suggested that it would require action of three different kinds:

First, legislative action by Parliament to replace the existing Regulations Act by a new statutory instruments act; second, a number of cabinet directives to implement several of the recommendations which cannot be dealt with by general legislation and, third, amendment of the Standing Orders...
...of the House of Commons...

...for the purpose of establishing a scrutiny committee to review regulations.

Mr. Macdonald said that:

The Government accepts fully the principle that both Parliament and the public are entitled to be fully informed of, and to have convenient access to, regulations and other instruments made under the

authority of Acts of Parliament. The legislation and other measures that will be proposed by the Government will be guided by this paramount principle, and only demonstrably necessary and carefully defined exceptions to the general requirements of the law relating to the examination, registration and publication of such instruments will be permitted.

The Acting Chairman: Is it in order to interrupt you now, Mr. Minister? The report that we are considering dealt exclusively with orders in council or statutory instruments, and did not deal with administrative tribunals or crown corporations generally, on the assumption that they are separate things or are interchangeable terms.

So, my first question is: Will the proposed legislation only deal with the subject matter of statutory instruments? And my second question is: Is the committee to be formed to be a Commons committee only, and will that interfere, as a matter of Government policy, with the proposed formation of the Senate committee to deal with the same subject matter?

Hon. Mr. Turner: On the first point, as to what the new Regulations Act or the new Statutory Instruments Act will deal with, it will deal with statutory instruments...

The Acting Chairman: Only?

Hon. Mr. Turner: Only. But the word "regulation" will be expanded and redefined.

On the second point, I would like to defer that because I think it is very pertinent to our discussion this morning.

The Acting Chairman: Would it not be more logical that new committees be set up in the other place and a continuance of our committee here to consider the supplementary aspects of administrative agencies, crown corporations, and the like, so that the whole subject matter of administrative action resulting from legislation will be dealt with? As I see it, here you are dealing with it in a partial way and you are not supplementing it by the consideration of the whole question of crown corporations.

Hon. Mr. Turner: I agree with your suggestion that the subject is one whole. Statutory instruments are just part of it. I think the enabling power for the instrument itself, the tribunals that administer the policies, and the regulations of the crown corporations that

may operate under the legislation and their procedures are all part of the same question.

The Acting Chairman: It would appear to be more logical. I am not introducing the fringe system and I do not want to complicate matters. It does appear to me that if you are tackling this whole problem that one would think that one should tackle the whole rather than a part.

Hon. Mr. Turner: Far be it from me to suggest the terms of reference to your committee. There is something to be said for the unity of the whole. I shall summarize my presentation to you, describing again what we are doing in those four areas. It may well be a subject for review by a senatorial committee.

The Acting Chairman: It would appear to me that you are eliminating concurrent consideration which is a major aspect of the problem which is related to the four headings that you gave and without blandishment to you, brilliantly and succinctly. The logic of that language calls for the study of these other agencies so as to fit in with the attainment of the four objectives.

Senator Connolly: I did not hear the minister in the beginning and I apologize for being late. In the area of crown corporations, the National Finance Committee of the Senate has given consideration to the operations of certain crown companies. From time to time the officials of those companies appear here and are thoroughly questioned on what they did. Again, I may be repeating and I apologize if I am. Is it intended that that type of inquiry shall be moved out of the Finance Committee and into another committee?

The Acting Chairman: Senator Connolly, as I see it, the activities of the Finance Committee in this respect merely deal with expenditures of money required for the agencies to function rather than with the subject matter of the surveillance and control of such agencies. I would assume it would come under two separate headings.

Senator Connolly: I am not too sure they are as restricted as that. They may be in practice, but in theory the Finance Committee investigates what it will do in respect to the operations of crown corporations.

Senator Flynn: There is always the possibility of duplication of work.

Senator Connolly: Yes.

Senator Flynn: There is a possibility.

Senator Connolly: It might well be a better thing for the Finance Committee not to have to deal with that if it should come under the purview of another committee. So the Finance Committee can restrict itself to consideration of the Estimates, which I think is an important function for the committee.

We have no authority in the House to change the Estimates. For years—and I have said this so often that I want to say it to the minister now—the Senate has been confronted with appropriation bills, often towards the end of a session. Year after year the members of the Opposition, no matter what party formed the Government, would stand up and say, “All we are asked to do is rubber stamp what the House of Commons has done.”

The Finance Committee has relieved that situation because it has given an opportunity for senators to investigate items in the Estimates. It might well be, Senator Flynn, that perhaps that would be a better term of reference for the Finance Committee and have the area now being discussed about crown corporations go to another committee for investigation.

Senator Flynn: For the record, may I correct part of your statement, which is not entirely relevant to the question when you say there is nothing we can do about Estimates. We can reduce them and not add to them.

Senator Connolly: Even that has been questioned. If I may say so, when your own party was in office at one time it was suggested that this be done, and immediately the Leader of your party in the Senate said that it interfered with ways and means and that we were not in a position to do it.

Senator Flynn: We can be wrong as well as you can.

Hon. Mr. Turner: I feel a little ill at ease because I come from a non-partisan house.

The Acting Chairman: I was about to say that this is the first emergence of partisanship that I have seen in a long time.

Senator Connolly: This was not partisanship, but the Leader of the Senate was trying to get the appropriation bill through.

Hon. Mr. Turner: Mr. Chairman, I should like to put on record what the President of

the Privy Council stated in the other place yesterday:

(a) Legislative action by Parliament to replace the existing Regulations Act by a new Statutory Instruments Act;

We will be bringing this forth in the fall:

(b) A number of Cabinet directives to implement several of the recommendations which cannot be dealt with by general legislation; and

And thirdly, a suggestion to the House of Commons that the Standing Orders be amended to set up a Scrutiny Committee.

I want to deal just briefly with each of those three items as they appear in Mr. Macdonald's statement. I will not be too long regarding this because I would rather hold myself open for questioning. On the first item, the new Statutory Instruments Act will update the present Regulations Act in light of the committee's recommendations. We will recommend that the definition of a regulation be expanded in order that certain subordinate legislation that is now excluded from the application of the present act will come within the scope of the proposed new law. It will be proposed that the review procedure of proposed regulations that is conducted by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice be given a statutory basis and that the fundamental principles in light of which the review is conducted be set forth in the legislation. A new system for registration of regulations will be provided and the date of registration will, in most cases, be the day on which a regulation will come into force. My comment here is that the current review procedure of proposed regulations is conducted by officers of the Department of Justice attached to the Privy Council Office. I might say that Paul Beseau, who is here with Mr. Thorson and myself, and whom you may want to question, was our man in the Privy Council and he was at times acting like our man in Peking.

Now, the amount of work required is an absolute phenomenon. I do not know if you have ever seen how voluminous the National Defence Regulations or the regulations under the Canadian Wheat Board Act are, but in any event the review procedure we have now, which is done as a matter of custom, will be given statutory authority. We have expanded the office of legal adviser to the Privy Council from one person to four in order to consolidate and re-enforce this review of regulations at the drafting stage.

Senator Connolly: For what purpose?

Hon. Mr. Turner: For the purpose of seeing that they do not offend against the statutes and the principles recommended in the report of the Statutory Instruments Committee, that they do not contain a hidden tax, are not retroactive, are not vague or uncertain and are not discriminatory and that they are legislative in content. So much for the new Statutory Instruments Act.

The second recommendation involving governmental decisions is very important too. Mr. Macdonald said:

With reference to the committee's recommendation No. 7, which is concerned with the general principles that should govern the conferring by legislation of regulation-making powers...

In other words, the enabling power of the statute.

...a Cabinet directive will be issued to all ministers directing that in future, all such enabling legislation should be drafted in accordance with the principles proposed to the committee as acceptable to the Government by letter dated September 30, 1969 addressed to the chairman of the committee and signed by the President of the Privy Council.

I can provide a copy of that letter to this committee. I think you should have it for the record.

Senator Connolly: Mr. Chairman, I move that the document appear as an appendix to these proceedings.

Hon. Senators: Agreed.

(For text of letter and accompanying appendixes, see Appendix A to these proceedings.)

Hon. Mr. Turner: What this means is very important. As Minister of Justice I have very little absolute power in controlling the breadth and scope of enabling legislation for regulation-making powers as it appears on the statute. A minister comes in and argues—or his support staff or public servants argue—that he needs wide discretionary powers in terms of fisheries, transportation, pollution or hazardous products—you will recall that—and I suggest to him in the Legislation Committee of the Cabinet that those powers are too wide. One minister wants to get his legislation through and he gets the support of a couple of other ministers and they run around those

of us who are trying to preserve the rights of the citizen. It is a high-low technique, as we used to say in Notre Dame, Senator Connolly. In any event, that is what happens. We have been trying during the last two years to cut down the scope and to add precision to the enabling powers in statutes.

There will be a Cabinet directive to implement at the Cabinet level the recommendations or the items set forth in the letter from the President of the Privy Council to the committee of the house. You should look at them, Mr. Chairman and, through you, the members of your committee. This will give me, if Cabinet adopts it, more leverage in implementing the recommendations of this report to which I subscribe and which was based in large part on the evidence that our department made before that committee.

The Acting Chairman: Will that authority be included in the legislative act?

Hon. Mr. Turner: No, it will not. That will be an internal Cabinet procedure. It is very difficult to include it in the statute procedures of the Privy Council.

The third part of Mr. Macdonald's statement has to do with the Standing Orders for the purpose of establishing a Scrutiny Committee. It reads as follows:

The Government agrees with the general recommendation of the committee that a Scrutiny Committee should be established for the purpose of reviewing regulations. During the next session of Parliament the Government will recommend that such a Scrutiny Committee be established and that by the proposed Statutory Instruments Act all regulations with the single exception of regulations the disclosure of which would be injurious to international relations, national defence or security or federal-provincial relations will stand permanently referred to such committee. After consultation with representatives of the parties, the Government will put forward an order of reference in the next session to enable Parliament to establish a Scrutiny Committee.

Mr. E. Russell Hopkins (Law Clerk and Parliamentary Counsel): May I ask one question of the minister, Mr. Chairman?

The Acting Chairman: Please.

Mr. Hopkins: I noticed Mr. Macdonald used the expression "Parliament". I am not clear

as to whether he intends the Scrutiny Committee to be purely an agency of the House of Commons.

Hon. Mr. Turner: The word "Parliament" was deliberately chosen.

Senator Connolly: Would you envisage a joint committee?

Hon. Mr. Turner: That would be for the house to determine.

The Acting Chairman: I am sure you remember in the *Debates of the Senate* that we did not mind being rebuffed from the point of view of no engagement, but having been engaged the engagement was terminated. There was a suggestion of a joint committee and then because of observations made by certain members in the other house the idea was to terminate the engagement without notice to one of the contracting parties.

Hon. Mr. Turner: Well, I will make no comment on that.

The Acting Chairman: We took a rather dim view of it.

Senator Flynn: There is always the possibility of a reconciliation.

The Acting Chairman: I simply want to refer to it, Mr. Minister. We took a dim view of it.

Senator Connolly: In England the House of Lords does this work primarily.

Hon. Mr. Turner: We can get into this later. Members may want my views. I am not going to trespass on the hallowed rights of the Senate or of the House of Commons to choose what committee structure they want. The word "Parliament" was deliberately chosen and it would be wide enough to envisage joint or separate committees.

Having dealt with Mr. Macdonald's statement, which is the Government's position on the recommendations of the House of Commons committee, which you will want to review, I would like to review briefly with you what the Department of Justice is doing by way of trying to equip itself to deal with statutory instruments.

Prior to the integration—perhaps you do not like that word—prior to the incorporation within the Department of Justice of all the legal officers in every department of Government, except the Department of External Affairs—prior to that all lawyers in every

Government department reported to a Director of Legal Services in each department. That Director of Legal Services, or what the English would call a senior solicitor, reported to his own deputy minister on administrative matters in giving him legal advice, but he now also reports to the Deputy Minister of Justice. This gives us certain advantages. First of all we get an earlier legal input into all governmental decisions. Secondly, there are better career opportunities for lawyers, because a lawyer just does not get pigeonholed in one department for life. He can now achieve lateral promotion. I think it allows us also to bargain on behalf of the professional lawyers in the Public Service, for salary rights. Our deputy minister can do that with the Treasury Board far more effectively than before.

Prior to that integration, the Department of Justice officers had very little to do with the drafting of regulations. Those were drafted internally by each department. Because the departmental solicitors are now being integrated into the Department of Justice, more drafting of regulations is being done by our own officers, as solicitors seconded to other departments.

Senator Fergusson: How long has this integration been in effect?

Hon. Mr. Turner: It was a recommendation, Senator Fergusson, of the Glassco Commission. It has been going on since then. It was accelerated when I became minister. The only department which has not been integrated is the Department of External Affairs and that is a special problem because of the type of law the department deals with. I do not deal with military law. The Judge Advocate deals with that department. The Department of National Defence also remains separate.

Senator Flynn: This has been experimented with in Quebec for several years.

Hon. Mr. Turner: And very successfully. With integration more drafting of regulations can be done by us, but it is obvious that we can only set out ground rules throughout this tremendously large governmental machine. We can attempt to reduce the amount of revision work done by the legislative section under Mr. Ryan and Mr. Beseau, which reports eventually to Mr. Thorson. We can start to improve the drafting of regulations. They still have to be reviewed by the legislative section, internally, of the Department of Justice or the unit we have in the Privy Council Office.

A program for this purpose has been submitted by the legal officers of the legislative section. We have set up training seminars on the requirements of drafting regulations. Unfortunately, the shortage of staff, Mr. Chairman, in that section at the moment, prevented our program from being started this spring as we had anticipated. It is my intention to enlarge it and try to get these seminars under way. When we succeed in getting the necessary training available to every department with solicitors assigned by the Department of Justice to those departments, we hope that we will begin to be able to prepare regulations in accordance with established standards as to form and draftsmanship and to meet the recommendations, at least, of the committee of the House of Commons, and fulfill any guidelines that may be set by any scrutiny committee set up by Parliament. In other words, we are trying to anticipate parliamentary review by putting ourselves in a position to assist the machinery available throughout the Government service.

I believe that we will achieve more uniform regulations and those less likely to offend against good drafting procedures, and the inadvertent or unusual can also be avoided more easily than at the present.

In the past the role of the Department of Justice in the preparation of regulations has arisen from the provision of the Regulations Act and the provision of the Canadian Bill of Rights, neither of which gave the department a very dynamic or positive role at the drafting stage. It is hoped that we will be able, if we achieve that Cabinet directive, to play a more positive role, both through our departmental solicitors in the original drafting and by applying control draft lines and a general supervision, so that in the preparation of the regulations and the preparation of the enabling statute we hope to have more internal authority than we now have.

Let me just summarize. In order to open up new remedies for the citizen against decisions made by his Government, there are several aspects to which Parliament must direct its attention. First, the enabling power in the statute itself. This is the key. The Minister of Justice and the President of the Privy Council, jointly, will be submitting to Cabinet a Cabinet directive giving the Department of Justice some control, pursuant to the recommendations of the committee, in accordance with the letter of the President of the Privy Council, setting out parameters of enabling powers. That is something which a scrutiny

committee of the Senate or a scrutiny committee of the House or a joint scrutiny committee would want to watch in the statutes themselves and call the Minister of Justice to account.

Senator Connolly: As the statutes are being considered?

Hon. Mr. Turner: Yes, or a committee of the Senate dealing with the substance of the statutes or a committee of the House of Commons dealing with the substance of the statutes might say that they do not like this power to make regulations and then we will refer it to the Scrutiny Committee.

Senator Flynn: You will not continue with the practice of giving power for making regulations which may be deemed necessary for the purposes of the act?

Hon. Mr. Turner: Senator Flynn, I do not have our guidelines before us. Why don't I read the pertinent part of the letter into the record? The letter is dated September 30, 1969, and is addressed to the Chairman of the House of Commons Special Committee on Statutory Instruments, and signed by the President of the Privy Council, the Honourable Donald S. Macdonald—so as to distinguish him from the other Donald Macdonald.

Senator Argue: Honourable was enough.

Hon. Mr. Turner: I am now quoting from the letter:

When bestowing the power to make regulations upon a person or a rule-making authority, care should be taken to ensure that the statute is not couched in unnecessarily wide terms. Specifically, certain powers should not be granted except after careful deliberation. These powers include the following: (a) power in a statute or in a regulation made thereunder to exclude the ordinary jurisdiction of the courts;

The exclusionary clauses...

(b) power to amend or add to the enabling Act or other Acts by way of regulation;

(c) power to make regulations having retrospective effect;

(d) power to subdelegate regulation-making authority;

(e) power by regulation to impose a charge on the public revenue or on the public other than fees for services;

(f) power to make regulations which might trespass unduly on personal rights and liberties;

(g) power to make regulations involving important matters of policy or principle."

That, I hope, answers Senator Flynn's question. First, the enabling power, the all-important first step that Parliament should be careful to observe. Secondly, the review of the regulations, once passed, by a permanent Standing Scrutiny Committee. The words of the Government statement in Parliament yesterday are wide enough to contemplate either separate committees or joint committees. I suggest that is a matter for both Houses of Parliament to work out.

Senator Connolly: You visualize a standing committee?

Hon. Mr. Turner: This will be a standing committee, Senator Connolly.

Third, we have an enabling power and regulations and the Scrutiny Committee. But what about the delegation of power that is exercised judicially or quasi-judicially? Say, two of us are competing for a licence, a broadcasting licence, or I want a higher rate either for a telephone system or interprovincial trucking firm, whenever that part of the Transportation Act is proclaimed, or for shipping of the Great Lakes; and you object. Whenever there is, in effect, a judicial proceeding, then if Parliament deems fit and both houses pass Federal Court Bill, there will be set up a new code of public administrative law that we sorely need, if I may modestly say so, in this country. When this bill—if it does reach this house—comes before this committee, I would direct the attention of the committee particularly to clauses 18, 28 and 29. The effect of these clauses is to transfer the traditional, ancient common law prerogative writs of *certiorari*, *mandamus*, prohibition, and injunction from the provincial superior courts to the new federal court. This Bill sets up as an alternative remedy, in clause 28, a very wide reviewing power—and I want to read it to you. Clause 28(1):

Notwithstanding section 18

...which is the prerogative writ section...

or the provisions of any other Act, the Court of Appeal

...of the Federal Court...

has jurisdiction to hear and determine an application to review and set aside a

decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis,

... we are not interfering with administrative policy...

made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(a) failed to observe a principle of natural justice

...failed to grant a hearing, failed to give equal chance to the parties to be heard, to cross-examine, to see the other side's witnesses and evidence

or otherwise acted beyond or refused to exercise its jurisdiction;

... excessive jurisdiction or failure to exercise jurisdiction...

(b) erred in law in making its decision or order, whether or not the error appears on the face of the record;

... No more avoiding a challenge on errors of law by refusing to give reasons for judgment.

or

(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

I think that you, senator, have often appeared before these boards, as have a number of other senators here and myself. You present your evidence; your opponent presents his evidence; and you wait for the decision and when and if it does come, it is based on evidence that neither side submitted, and you wonder where the material came from. I believe this is a third strong arm for the citizen against the state.

Senator Flynn: It sounds like an improved writ of evocation that we have in the Quebec Code of Civil Procedure.

Hon. Mr. Turner: There are some similarities. I believe that the remedy is even wider here.

Senator Flynn: That is why I said "improved".

The Acting Chairman: I would like to congratulate you that the younger lawyers who are developing their practice will do well with the interpretation of natural justice and

the necessity of discriminating between administrative decisions and quasi-judicial decisions.

Hon. Mr. Turner: We do not attempt to define that in the bill.

Senator Connolly (Ottawa West): Could I revert to the other question about the scrutiny committee on standing orders?

Hon. Mr. Turner: May I just finish? I will be five more minutes.

Senator Connolly (Ottawa West): All right.

Hon. Mr. Turner: The final avenue is: What do we do with these boards and tribunals themselves? We can review the enabling power setting it up; we can review the regulations that relate to it; we can provide some sort of judicial review; but what about the procedures of these boards themselves? We have so many of them that it is difficult to conceive of standard rules of procedure. A subject that we have to explore in the Department of Justice, and that I believe Parliament should explore, is: Should there be a code of minimum procedural protection before these boards? Should there be something similar to an administrative procedures act as enacted by Congress, or should we use the United Kingdom technique of setting up a council of tribunals Act? The American technique is to set up minimum rules of procedure. The British technique has been to set up a review or scrutiny tribunal sitting over administrative tribunals, to which complaints can be brought if procedure has been offended, without defining what those minimum procedures are.

Those are two alternative techniques, and I believe that Parliament is going to have to choose: (a) whether we need it; and (b) what method we are going to use.

The Acting Chairman: Would you like to express an opinion of your preference on that? It would be interesting to know.

Hon. Mr. Turner: I am inclined at the moment—without taking a fixed position—towards an administrative procedures act. However, I do recognize the tremendous variety of procedures necessary. Obviously, you cannot conduct a National Energy Board hearing the way you are going to conduct a transportation hearing, a broadcasting hearing, or an immigration hearing.

Trying to get minimum procedures that will apply equally well to all these boards

may be too Herculean a task. I am going to suggest something very un-Canadian to you, Mr. Chairman: obviously we need some facts before we have policy! In other words, there is going to have to be a lot of research done on the mechanics of these boards and tribunals.

That is the conclusion of my presentation, and I am sorry I have been so long, but it is a subject that is very close to my heart and I am delighted that the Senate and this committee are taking cognizance of it.

The Acting Chairman: Thank you very much, Mr. Minister.

Senator Flynn: Would boards include the powers given to a department or minister or official?

Hon. Mr. Turner: In the Federal Courts Bill, yes.

Senator Connolly (Ottawa West): Mr. Chairman, there is just one small point on the second-last matter that the minister discussed. Senator Langlois brings it to my attention. When I asked whether or not it was intended that the scrutiny committee be a standing committee, if it is to be a joint committee, as Senator Langlois suggests, it can hardly be a standing committee, and perhaps when the act is drafted that may be taken into account.

Hon. Mr. Turner: I will take a note of that, through you, Mr. Chairman. Really, I think the Government would be interested in the views of the Senate as to how this ought to be done.

Senator Connolly (Ottawa West): Senator Fergusson suggests that the restaurant committee is a standing committee.

Senator Fergusson: And the library committee.

Senator Flynn: I do not think it should be included in the act, because this is a matter which rests within the province of Parliament.

Senator Connolly (Ottawa West): Senator Langlois raised the doubt as to whether it could be a standing committee, so I am glad we have raised it now. Obviously, it could be.

Hon. Mr. Turner: Despite some commentaries that one has read to the contrary, this Government is very solicitous of the rights of Parliament, and the legislation will not be drafted in any way so as to bind the procedures of either house as to how they conduct

this type of scrutiny. It will provide for regulations being referred to scrutiny committee, but what type of committee will be left to each house, or to both houses jointly.

The Acting Chairman: Are there any other observations, honourable senators?

Senator Argue: Mr. Chairman, I would like to apologize for having been late and missing the burden of the minister's remarks but as a layman, who knows little or nothing about the law, I have been impressed by what he has said regarding the Government's determination to carry out the recommendations of the house committee on statutory regulations, etcetera.

I have made it something of a chore myself to study the new Wheat Board policy on Lift. I think that this offends, in almost every way, against the recommendations of that committee. The minister has made some comments as to how these things get by. I wonder if he would care to make any comment on how this came about. I am not a layer and I cannot do as good a job, but as a farmer who understands the Canadian Wheat Board Act and how it has been applied, I would say that this policy has turned the Wheat Board Act into its opposite: it has made it a punitive measure; it has been used not as a marketing instrument but as a coercive instrument to prevent farmers seeding crops; and it has in it a retroactive aspect because it relates to summer fallow of a previous year. It has in it, I would suggest, a very serious penalty provision, because you either conform with the new policy or you are unable to market your grain.

I know the minister's difficulties, but I would really be interested if he would care to pass some remarks, as a distinguished lawyer, about whether or not this darned thing does offend these regulations, because if it should not, then in my opinion, there is not anything you could not get away with.

Hon. Mr. Turner: Through you, Mr. Chairman, all I will draw Senator Argue's attention to is the fact that he can read the recommendations of the House of Commons committee, compare those recommendations to the statute, and determine for himself whether they are in accord.

I might point out to him that this was not an ordinary statute; this operation was set up by an appropriation act. I think that he has recognized the difficulty I find myself in, but I think that he has drawn something of some importance to the attention of this committee.

Senator Argue: Appropriation Act, yes, but it is based on regulations of the Canadian Wheat Board, and without the powers in the Canadian Wheat Board Act, again being a layman, I would suggest to the minister it could not be operative. I think his non-comment is quite significant! I am interested in having another run at this thing.

Senator Flynn: Eventually, you may use the committee of review, the standing committee of review.

Senator Argue: I wonder if I might conclude? As I understood from the minister responsible for the Wheat Board, this is a one-year policy; it ends in one year. I wonder what position we would be in, as a Parliament or as a country or as a farmer, that might be different if they are thinking of some kind of a policy like this again—and I hope they never consider this kind of policy again, because it is offensive on all grounds, and I think the Government will recognize that too. But, in any case, what happens at another time? In other words, if it is a one-year policy, I take it they have to go through the same procedure to do it over again, if they wish to—but maybe they do not.

Hon. Mr. Turner: I think, senator, through you, Mr. Chairman, the guidelines which will be accepted by the Government speak for themselves, and presumably any future legislation would have to meet those guidelines. Exceptions are contemplated, but exceptions would have to be justified before a scrutiny committee, if it were set up.

Senator Argue: After they had gone into effect.

Senator Flynn: Of course.

Hon. Mr. Turner: You would have two whacks at it: firstly, at the enabling stage, the statute itself; and, secondly, at the regulation stage. While it is true that the regulation might have been passed before it reaches the scrutiny committee, still the scrutiny committee can be a vehicle of some importance and provide a vehicle for just the argument you are making.

Senator Argue: I appreciate that, and I think that if a Canadian Wheat Board Act, or any other act that affects a large number of people, is going to operate in a reasonable, fair and acceptable way, then no Government should undertake this kind of far-reaching change in the regulations or the provisions without some scrutiny and some discussion in

advance. We have had a discussion on it, and I think the stand I have taken has great support in the Senate, on principle. They may think I have gone too far in some of the ways I have expressed it...

Hon. Mr. Turner: Mind you, if I may interrupt, Parliament chose the vehicle of an Appropriation Act to set this operation up.

Senator Argue: I realize that.

Senator Flynn: Mr. Chairman, I wanted to ask the minister this. I suppose a joint standing committee, or a committee of either house, such a review committee, could entertain any complaint made by an individual. I mean, we could provide not only for regular review of regulations, but also entertain any complaint made to us if our regulations would so provide. Adding, of course, the remedies of the Federal Court which you have just mentioned, would you agree with me that we would not, with that machinery, need an ombudsman in the federal administration? It would, in some way, because you have said even the administrative decisions of ministers would come under the machinery of review and correction.

Hon. Mr. Turner: Obviously, Mr. Chairman, the terms of reference of the scrutiny committee, or committees, whatever they may be, will determine the scope of those committees. However, I would assume that the committee would have the power to hear grievances and witnesses. That would depend on what the terms of reference would be.

I think I should underline the fact that in order for this committee, or these committees, to be effective they are going to need some very skilled supporting staff.

You have mentioned the ombudsman. The ombudsman is an extra legal remedy. It is a remedy that in some jurisdictions has been found necessary because the methods of administrative or judicial review have been found to be inadequate.

I would suggest that the more we are able, in the measures I have tried to outline to this committee, to improve the avenues of administrative and judicial remedy, the less necessary an ombudsman might be.

I visited Sweden last October and talked for a day, exchanging two meals with him, with the Swedish Ombudsman Mr. Bexelius. I also had an afternoon with the Parliamentary Commissioner or Ombudsman of the United Kingdom. And, of course, I know the Canadian

an Provincial Ombudsmen—le protecteur du peuple du Québec, et les autres.

There seem to be certain difficulties that one would have to overcome if we were to have an ombudsman in Canada. First of all, no federal state has yet had an ombudsman at the federal level, and about 19 out of 20 of the complaints that he would receive would undoubtedly relate to provincial jurisdiction.

Secondly, the geographical area of Canada is immense. The ombudsmen currently in operation in the Scandinavian countries, in the United Kingdom, in Hawaii, in four Canadian provinces and in New Zealand are all in relatively cohesive geographic entities. Most of them are very small countries geographically. I take this from conversations with these men, that an ombudsman to be effective must personally see the complainant. He must often personally visit the areas in which the complaint arises. And if an ombudsman, in order to discharge his duties, has to set up a supporting staff that turns him into a second bureaucracy, superimposed on the other, then you have defeated your own purpose, because you have one bureaucracy imposed upon another, from which, by the way, there is no appeal.

Senator Flynn: This is my view. I thought you had covered the ground perfectly with this machinery, so that we could dispense with an ombudsman.

Hon. Mr. Turner: The ombudsman idea, which was injected into the Swedish Constitution in 1812, was made necessary by certain differences in their parliamentary procedure from our own. First of all, there is no ministerial responsibility there. Secondly, there is no responsibility of an inferior to a superior in the public service; they are governed by regulations. Thirdly, a Member of Parliament, in the Swedish Parliament, cannot bring a complaint on behalf of a constituent by way of grievance to the attention of the House of Commons or the Senate. So, obviously, there would be no avenue for airing these complaints in the legislatures and no ministerial responsibility by elected representatives, and other methods had to be found.

We do have ministerial responsibility; we do have a grievance procedure; and if a Member of Parliament is doing his job he is the best ombudsman a citizen can have.

Now, I am not closing my mind to it, but I am suggesting that there are hurdles that have to be passed.

Senator Flynn: But on top of the committee of each house of Parliament, you have, of course, the Federal Court which will play a significant role, if I can assess what you said properly.

Senator Gouin: I have been greatly interested in the question by Senator Flynn and in the answer given by the minister concerning what we would call complaints against the application of a regulation, but I want to make a suggestion concerning what I would call some preventive courses.

In Quebec we have a Minimum Wage Board, when it is a general ordinance—I would take the extreme case, universal application. We had beforehand, I know, an inquiry in which I represented the producers, the consumers, the employers and the trade unions. When a regulation is what I would call of vital importance, would it not be advisable also that the parties at large would have the opportunity to be heard before the regulations are adopted?

Hon. Mr. Turner: I think in certain cases it would be very useful. As a matter of fact, that procedure has been followed in certain increasing numbers. Through the influence of the Department of Justice we are suggesting this to other departments. Perhaps Mr. Thorson would like to speak on that.

Mr. Thorson: I think you will observe, in a number of statutes presented to Parliament this session, that there is provision for the advance tabling of proposed regulations. Examples which occur to me are the new automobile safety Act and the Arctic Waters Pollution Prevention Act. I believe there are one or two others, as well. The Territorial Seas Bill is a third example.

One cannot generalize that all regulations can or should be tabled in advance of the effective date of their making, but increasingly we are working toward provision for advance publication in appropriate cases.

Senator Flynn: Does this procedure mean that when you give notice of regulations which will come into force you will invite objections or representations at the same time?

Mr. Thorson: Yes. The whole purpose, of course, is to present the public, not with a *fait accompli* but with a proposal, coupled with an invitation—in the statutes which I gave as examples presented to Parliament this year—to interested members of the public to comment.

Senator Fergusson: I would like to speak on the Ombudsman question, which has been brought up. I am not saying that we ought to have a federal Ombudsman. I am not impressed with the fact that there would be a large proportion who would be thinking about provincial matters, because I should think you would only need to have some ordinary person who would be able to refer this to the province involved. That should not take too much work. I am thinking of the very excellent work being done in New Brunswick by our Ombudsman, Dr. Flemmington. It is not only the number of administrative matters which he can adjust, and of course he has done a number of them, but it is the confidence people have in knowing that they have someone they can go to. I think it has great value in that way. Whether or not the help which he has been able to give in actual cases is impressive I do not know. I know from the feeling in New Brunswick that it is a good thing for the people to know that they have an Ombudsman.

Hon. Mr. Turner: I am still of open mind, Mr. Chairman. It is far more difficult to achieve this at a federal level than at a provincial level.

Senator Flynn: We would give publicity to the machinery set up here. If people generally knew they could come to a committee of the Senate or the House of Commons or a joint committee of both houses, they would have the same feeling of confidence as there apparently is in an Ombudsman.

Senator Fergusson: I disagree with you, as to how it would affect people. They know nothing about machinery that is set up, and it would not impress them as much as knowing there is someone they can go to.

Senator Flynn: Do you think the word Ombudsman...

Senator Fergusson: I think it means something.

Senator Flynn: It is a problem of educating people.

Hon. Mr. Turner: If I might comment on one remark, Mr. Chairman, with the courtesy of the committee. Last year among my responsibilities I had that of piloting or sharing the responsibilities of piloting the Official Languages Bill through the House of Commons. The Official Languages Commissioner is, in effect, a language Ombudsman. There

was a lot of criticism from all quarters of the House as to the powers given to the Official Languages Commissioner.

It was said that he was, in effect, exercising judicial power, which he was not. It was also said that there was no appeal from him, which was true, because he was not exercising any judicial power and not deciding rights. He only brings matters to the attention of Parliament.

Some of the Alberta members were highly critical of this, so I read them a statute which was drawn in exactly the same terms as the power setting up the Official Languages Commission. The statute was the power setting up the Alberta Ombudsman. In other words, the House of Commons—I do not recall with enough precision how the debate went in the Senate on that date—was very nervous about the powers given to the Official Languages Commissioner. They were no wider than powers enjoyed under those statutes that set up the Ombudsmen in the four provinces.

Senator Flynn: It was a more limited field too.

The Acting Chairman: Before asking for a motion for adjournment, honourable senators, I am sure that you would want me—and of course I am very pleased to do so—to thank the minister for what I believe is a brilliant presentation of the problem, even to the point of being inspiring. I personally think this whole question of statutory instruments and the direction in which he is moving is simply marvellous and I cannot say any more. I, also on your behalf, honourable senators, would like to thank Mr. Thorson for his co-operation in being with us today. Before concluding, Mr. Minister, I will advise you that we intend to call Mr. MacGuigan who, of course, played such an important part, as chairman in the other place, to develop some further thoughts on this matter. We are hopeful, of course, that as a committee we will come up with some constructive considerations.

The committee adjourned.

Ottawa, September 30, 1969.

President of the Privy Council

Mr. Mark MacGuigan, M.P.,
Chairman,
House of Commons Special Committee
On Statutory Instruments,
Ottawa 4, Ontario.

Dear Mark,

I am writing to transmit to you, as Chairman of the House of Commons Special Committee on Statutory Instruments, the Government's answers to questions 13, 16, 17, 18, 21, 22 and 23 contained in the questionnaire relating to statutory instruments that was circulated by the Special Committee earlier this year. These questions, along with the government's answers, are set out for the convenience of members of the Committee in the form of an appendix to this letter, marked Appendix "A".

A further document entitled "An Analysis of the Grant of Power to make Regulations" encl.

is also attached as Appendix "B". This latter document, which is concerned with the analysis and classification of the major forms of grants of regulation-making power, is mentioned in Appendix "A" at page 7 thereof.

I trust that this material will prove to be useful to members of the Special Committee and will be of some assistance in the formulation of the Committee's views and conclusions.

Yours truly,
Don Macdonald

APPENDIX "A"

Answers to Questions 13, 16, 17, 18, 21, 22 and 23

Question 13: Who specifically within your Department or Agency formulates the policies found in your regulations?

Answer: The Minister or other regulation-making authority formulates the policy found in regulations with such assistance and advice as he or it regards as necessary.

Question 17: Is there any reason why regulations could not be published within fifteen days of being made?

Answer: Regulations could be published within fifteen days provided all the necessary personnel and facilities were available. This would involve considerable additional expense both to the Departments and Agencies involved and for the central Agencies. The current inhibiting factors are purely administrative.

Question 16: What circumstances do you envisage would make it necessary to extend the time for publication of a regulation under section 6(2) of the *Regulations Act*, R.S.C. 1952, Chapter 235?

Question 18: What circumstances would, in your view, justify the exemption from publication of a regulation?

Answer: Extension of the time normally allowed for publication of a regulation under s. 6(1) of the *Regulations Act*, R.S.C. 1952, Chapter 235 and exemption from publication of a regulation many from time to time be justified in the following circumstances:

- (a) where notification or other form of communication would be more appropriate;
- (b) where the safety and security of the country or part of it might be adversely affected;
- (c) where information might be disseminated which could deleteriously affect Canada's foreign relations;
- (d) where the regulation involves the distribution of information which might adversely affect the relations of the provinces *inter se*;
- (e) where the regulations are of limited application and involve the granting of privileges or the relaxation of rules;

(f) where other conditions from time to time necessitate that a regulation should be exempt from publication or that its publication be postponed provided that the provisions of the *Regulations Act* are complied with;

(g) an extension of the time normally allowed for the publication of a regulation may be necessitated where the matter is one of urgency.

Question 21: How would a person, both inside and outside of your Department or Agency, satisfy himself as to the authenticity of a regulation not transmitted, recorded, published or laid before the House in accordance with the *Regulations Act*, *supra*?

Question 22: How would you prove the authenticity of such a regulation in a court of law, should this be necessary?

Answer: Resort might be made to section 21 of the *Canada Evidence Act* which provides for the production of certified copies as the means of proving a proclamation, order, regulation or appointment made by or under the authority of the Governor in Council or of a Minister of the Crown or the Head of a Department.

Question 23: Please advise as to any suggestions or submissions which you may have respecting the improvement of the mode or process of conferring the power to make regulations and the preparation and bringing into effect of regulations.

Answer: Several matters might be considered in connection with reform of the formulation, enactment and review of statutory instruments.

Firstly, Parliament should take into account certain guidelines when enacting enabling legislation. It should be borne in mind by both Chambers of Parliament that personal rights and liberties should not be unnecessarily curtailed. Therefore, when bestowing the power to make regulations upon a person or a rulemaking authority some care should be taken to ensure that the statute is not couched in unnecessarily wide terms. Specifically, certain powers should not be granted except after careful deliberation. These powers include the following:

- (a) power in a statute or in a regulation made thereunder to exclude the ordinary jurisdiction of the courts;

(b) power to amend or add to the enabling Act or other Acts by way of regulation;

(c) power to make regulations having retrospective effect;

(d) power to subdelegate regulation-making authority;

(e) power by regulation to impose a charge on the public revenue or on the public other than fees for services;

(f) power to make regulations which might trespass unduly on personal rights and liberties;

(g) power to make regulations involving important matters of policy or principle.

When considering enabling legislation the Chambers of Parliament might reflect on whether the delegation of a rule-making power is best adapted to achieve the end desired.

Secondly, it would appear desirable for some form of scrutiny to be performed on a continuous basis and a Committee is proposed as the best device to exercise this function. The most appropriate composition of such a committee would appear to be a Joint Committee of members of the House of Commons and Senators. Such a Committee should have the power to sit during the Parliamentary recess. The Committee should have the power to examine and scrutinize all regulations tabled in the House of Commons or in the Senate.

The Joint Committee for the Scrutiny of Delegated Legislation should have the power to call for oral and written explanations of regulations from the Department or Agency which originally proposed such regulations. The Committee should also have the power to remit regulations to the Department or Agency proposing such regulations. The power of remission would in no way affect the status as law of the regulations remitted, but would merely express the disapproval or concern of the Committee in a formal way. The Committee ought also to have the power to report to both Chambers of Parliament. It is envisaged that the Committee would make periodic reports at such intervals as it may determine. It is also expected that the Committee might make *ad hoc* reports for the purpose of drawing the attention of members of the House of Commons and Senators to particular regulations. This latter power would be exercised within the terms of reference of the Committee.

The assistance of qualified staff ought to be made available to the Committee.

The scope of enquiry of the Joint Committee for the Scrutiny of Delegated Legislation ought not to be limited and might include the following enquiries:

1. Does the regulation tend to oust the jurisdiction of the courts?
2. Does the regulation make unusual or unexpected use of the powers conferred by the enabling statute?
3. Has there been any unjustifiable delay in any stage of the making of the regulation?
4. Does the regulation have retrospective effect?
5. Does the regulation trespass unduly upon personal rights and liberties?
6. Is the regulation clear in meaning?
7. Does the regulation impose a charge other than fees for services?
8. Is the regulation enabling statute, and is judicial determination of this question available in an adequate way?
9. Is it necessary for any reason for Parliament to pay special attention to the regulation?

Consideration might be given by both the House of Commons and the Senate to setting aside a certain time on a regular basis for consideration of the reports of the Committee. Both the *ad hoc* reports and the periodic reports of the Committee might be tabled and deliberation of both these types of report could be undertaken. The timing and length of such period of deliberation should depend on the frequency of the reports of the Committee and the wishes of the members of the two Chambers.

Thirdly, requests for broad subordinate legislation-making powers should ordinarily be accompanied by some appropriate pre- or post-review control. While it must be recognized that no mathematical or scientific formula can determine with precision those grants of power that should be subjected to pre- or post-review control, it does appear that control mechanisms such as those found in subsections (3) to (5) of section 5 of the *Atlantic Regions Freight Assistance Act* and in section of the *Maritime Transportation Union Trustees Act* can and should be resorted to more frequently than in the past.

In considering this problem, grants of legislative power can be analysed and classified into at least three forms of categories—see appendix “B”.

Fourthly, the *Regulations Act* or the regulations made pursuant thereto should be amended so as to provide for the authority of the Deputy Minister of Justice to review dele-

gated legislation submitted in draft form for approval having in mind the various criteria and safeguards previously referred to; and consideration might also be given to having the Deputy Minister of Justice make a report to the Clerk of the Privy Council where, in his opinion, any draft regulation fails to meet those criteria or safeguards.

APPENDIX "B"

An Analysis of The Grant of Power to Make Regulations

The term "regulations" as here used is all embracing and is intended to equal the definition in the Regulations Act.

A regulation-making authority (abbreviated r.m.a.) includes all authorities other than Parliament itself.

1. *Forms of Grant*

There are three distinct major forms:

- (1) Power to make a particular regulation as described in the Act;
- (2) Power to make regulations for a specified purpose;
- (3) Power to make regulations in relation to a subject-matter.

Forms 2 and 3 are recognized (with slight difference in name only) in the Nolan case (P.C.). Form 1 is added to complete the picture.

There may also be combinations and fusions of these three distinct forms.

2. *Particular Regulation*

This is a power to make a regulation the nature and content of which is described in considerable detail by Parliament itself. Thus, a regulation "to prohibit the import of used automobiles" leaves virtually no elbow room. The r.m.a., and only he, can do just that; nothing more.

The characteristics of this form of power are that in the normal case it is tightly limited and the terms of the regulation are predictable. There can seldom be any surprises.

The *Public Service Superannuation Act* is a good example of powers of this class.

3. *Specified Purposes*

In this form the power given is to make regulations for the attainment of certain objectives or purposes. This is considerably wider than Form 1. The extent of the power depends on the statement of purposes.

The purposes may be governed by the "intent of the Act". Thus, the power may be to make regulations "for carrying the purposes and provisions of this Act into effect", or it may be for certain stated purposes that are clearly ancillary or subordinate to the "intent

of the Act" as revealed by the other provisions in the Act. In both these cases, there is a degree of legislative control, enforceable by the courts. The courts can ascertain the "intention of Parliament" from the terms of the Act as a whole, and can say whether the regulation is or is not for the stated purpose. Also, if the purposes of the Act as a whole govern, the nature and kind of regulations that may be made can be envisaged.

The purposes, however, may be stated independently, outside the umbrella of the Act as a whole. Thus, a single-section statute could empower a r.m.a. to make regulations "for promoting the economic welfare of Canada". Or, in an Act with broad purposes (e.g. emergency powers) a statement of purposes might have no discernible verbal relationship to any other provision of the Act. Powers of this kind can be extremely broad—the broader the purpose the greater the power. With a wide purpose, it is very difficult to say that a regulation is clearly outside the purposes, and it is difficult to imagine what kind of a regulation might be made. Hence, there is little legislative or judicial control.

4. *Specified Subject-matter*

Power to make regulations may be in the form of power to make regulations *in relation* to a stated subject-matter. This is the broadest form, because a *relationship* to a general subject can easily be manufactured. Note that sections 91 and 92 of the *B.N.A. Act* take this form.

The characteristics of this form are that there is virtually no limitation on the power by the terms (purposes, intent, etc.) of the Act itself, but only by the words conferring the power. Since "relationships" can be almost anything, it is also difficult to predict with any degree of accuracy the range of regulations that might be made. Again, the broader the subject, the greater the power.

The courts do have control, for they can say that a particular regulation is not in relation to the stated subject, but the broader the subject or the more general the words describing the subject, the more difficult it becomes for the courts to strike down a regulation.

Two statutes illustrate how powerful these two forms, purposes and subjects, can be. The

War Measures Act (purposes) and the *Fisheries Act* (subject).

5. Judicial Control

In all three forms, the courts do have a degree of ultimate control. They can say that a regulation is not

- (1) of the kind described—class 1
- (2) for the purposes described—class 2
- (3) in relation to the subject described—class 3.

This power may be seriously eroded or even taken away by the familiar phrase “as he deems necessary, desirable, expedient, etc.” Thus, where power is conferred to make regulations.

- (1) “prescribing such fees as he considers necessary” (class 1),
- (2) “as he deems necessary for the purpose of” (class 2), or
- (3) “as he deems to be in relation to” (class 3),

the courts have little more than a theoretical power to strike down. (For example, *War Measures Act*—Chemicals Reference). The test whether the regulation falls within the Act is thus converted from objective to subjective.

6. Sub-delegation

Whether a r.m.a. can delegate to another r.m.a. is largely a matter of construction. There is probably no valid argument against sub-delegation in Forms 2 and 3. A delegating regulation can be said to be for the purpose, or in relation to a subject, specified in the Act.

7. The regulation-making authority

For the most part, power to make regulations is under Federal Statutes conferred on the Governor in Council. This has certain advantages and disadvantages.

It is a disadvantage because it is almost impossible for the Governor in Council (which in Canada must be equated to the Cabinet) to examine proposed regulations even superficially, yet, under our theories of Cabinet and party solidarity, the whole Cabinet and party in power must defend them.

If regulations are made by *Ministers*, the same considerations do not necessarily apply. For the most part the Minister would make his regulations himself (with the advice and assistance of his staff and the Department of Justice) and he would take responsibility for

them. He would, of course, be well advised to consult his colleagues or Cabinet on important matters of policy, but the ultimate responsibility would be his and not that of the Government collectively.

Certain Boards, Commissions, etc., also have authority to make regulations. Procedural and administrative regulations can properly be made by them on their own, but the power to impose fees or penalties should not be broadly conferred without some control.

8. Control

The question to be considered is whether any class of grant of power to make regulations should be subjected to some form of control.

There is no mathematical or scientific formula for deciding what classes of grants should be subjected to further Parliamentary control. This is largely a matter of degree and judgment, and one can only suggest a few general principles or approaches.

There are some situations that are fairly clear.

First, the “deems necessary” formula could be eliminated in all but a few exceptional cases. This changes the test of validity from subjective to objective and automatically reinstates judicial control.

Secondly, class 1 grants of power should not cause much difficulty. In most cases there is full legislative control; the regulation that may be made is minutely described, almost to the point where it might be said that Parliament itself has made the regulation, except for minor details. It must be pointed out, though, that class 1 can also be wide and powerful. Thus, authority to make a regulation “prohibiting the import or export or interprovincial movement of any article” is a wide grant because it is vague and general. A case of this kind would need a second look. In the ordinary case, however, class 1 powers are administrative, procedural, subordinate or ancillary, and should not be objectionable.

Class 2—purposes—may be objectionable or unobjectionable, depending on the terms of the Act and the terms of the power. The thing to look for here is whether the purposes, as expressed in, governed or limited by, or ascertainable from the provisions of the Act *other than the section in which the power is conferred*.

Thus, power to make regulations “to carry out the purposes and provisions of this Act”

should be unobjectionable. Similarly, an Act that is complete or detailed one, with an ascertainable overall intent or scheme, would govern the regulation section.

The Acts that should arouse suspicion are those that are only "sketch" Acts and have little in them other than the grant of legislative power, and those Acts where the language of the powers cannot be restricted or controlled by the language of the Act as a whole. But even these powers are not to be condemned outright; it remains to examine the terms of the power itself to see if the degree of legislative control falls short of an acceptable level. Thus the power to make regulations respecting sea coast and inland fisheries is too wide; but power to make regulations respecting the maintenance and operation of interprovincial or international ferries is not. It is a question of judgment and degree.

Class 3, because it lists subjects, is not so easily identifiable with the purposes of the Act. The words used in conferring the power may get their meaning from the whole Act, but it is not as easy to relate subjects to purposes as it is purposes to purposes. Even in a long and detailed Act, subjects can easily be slipped into the power section that bear no discernible relationship to anything else in the Act. Hence, class 3 must be looked at as being suspect. In many cases, the only legislative control may be in the words conferring the power, and we are back to judgment and degree. Power to make regulations with respect to the licensing of interprovincial ferries may be unobjectionable, but not so a power to make regulations with respect to navigation and shipping.

What is needed for classes 2 and 3 is first to work out the broadness of the description of purposes or subject and then to decide what is acceptable to Parliament and to the people.

9. Tests for Need to Control

Two approaches may be taken to see whether a power should be controlled. They are not mutually exclusive, and in some cases come to the same thing.

One is, can the regulations that may be made be predicted with reasonable accuracy? Does the public know what it may expect?

With class 1, there is little difficulty. With class 2, if the purposes are in the Act itself and not just in the power section, it is probably unobjectionable. But if the purposes are described only in the power section, and it is

so wide that the public cannot tell what it is going to get, then some safeguards should be inserted or the broad language should be cut down.

With class 3, we depend more on the words of the power alone. The swing should be away from broad general language, and the subject-matter should be closely defined so that we know what to expect. Also a general statement, describing the purposes for which regulations might be made, could be inserted. An example is the *International River Improvements Act*.

Classes 2 and 3 may be combined and thereby impose a double test. Thus the Governor in Council may *for the purpose of* etc. make regulations *in relation to*. This form gives a better clue to what is needed, and provides more room for limiting power by interpretation of the whole Act. The public then has a better idea of what to expect.

Another approach is to ask what legislative control there now is, and whether it is enough. Has Parliament said, expressly or by implication, what kinds of regulations may be made or what they are to be. Bare powers of class 2 and 3 should be looked at with care, and if they are too broad to be acceptable, steps can be taken to cut them down. If the Act is a detailed or full one, the power can be tied to the purposes of the Act. If the Act is a "sketch" Act, the powers should be described in language that leans to the particular rather than the general. And, as indicated above, purposes and subjects can be coupled so as to cut down on broad powers.

10. Parliamentary Review

The most effective check on the exercise of power to make regulations is a close examination of the power itself when the Bill to grant it is before Parliament.

Secondly, members should read regulations and protest against any they do not like. Regulations are published and tabled. Greater use should be made of political weapons. Genuine control must necessarily be primarily political rather than procedural. Publicity and criticism, in the last analysis, are the real safeguards.

There are two prerequisites to effective Parliamentary review:

- (1) members must read regulations; and
- (2) time must be made available to members to speak about regulations after they are tabled.

A House scrutiny committee might well be an effective means of providing opportunity for public examination and criticism. The main functions of such a committee would be to expose regulations to the glare of publicity and bring to the attention of the government and the public any objectionable features thereof.

11. *Judicial Review*

Almost certainly the most effective review

power by the judiciary is to declare a regulation *ultra vires*.

Any court, from a Justice of the Peace to the Supreme Court of Canada can hold that a regulation is *ultra vires*. But obviously much depends on the nature of the power. If there are adequate legislative controls as previously described, a very important protection against abuse of power is available.



Second Session—Twenty-eighth Parliament

1969-70

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE

ON

Legal and Constitutional Affairs

THE HON. EARL W. URQUHART, Q.C., *Acting Chairman*

No. 7

WEDNESDAY, JUNE 24, 1970

*Complete Proceedings on Bill C-212,
intituled:*

*“An Act to amend the Yukon Act, the Northwest Territories Act
and the Territorial Lands Act”*

WITNESSES:

*Department of Indian Affairs and Northern Development: Mr. D. A.
Davidson, Acting Director, Territorial Relations Branch; Mr. G. B.
Armstrong, Chief, Water Resources Section.*

REPORT OF THE COMMITTEE

MEMBERS OF
THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*.

Argue	Flynn (<i>ex officio</i>)	McGrand
Aseltine	Gouin	Méthot
Bélisle	Grosart	Petten
Burchill	Haig	Phillips (<i>Rigaud</i>)
Choquette	Hayden	Prowse
Connolly, J. J.	Hollett	Roebuck
(<i>Ottawa West</i>)	Lang	Smith
Cook	Langlois	Urquhart
Croll	Martin (<i>ex officio</i>)	Walker
Eudes	Macdonald, J. M.	White
Everett	(<i>Cape Breton</i>)	Willis
Fergusson		

30 Members

(Quorum 7)

ORDER OF REFERENCE

Extract from the Minutes of Proceedings of the Senate, Tuesday, June 23, 1970:

A Message was brought from the House of Commons by their Clerk with a Bill C-212, intituled: "An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act", to which they desire the concurrence of the Senate.

The Bill was read the first time.

With leave of the Senate,

The Honourable Senator Martin, P.C., moved, seconded by the Honourable Senator McDonald, that the Bill be placed on the Orders of the Day for a second reading later this day.

The question being put on the motion, it was—
Resolved in the affirmative.

Pursuant to the Order of the Day, the Honourable Senator Prowse moved, seconded by the Honourable Senator Macnaughton, P.C., that the Bill C-212, intituled: "An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act", be read the second time.

After debate, and—

The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Prowse moved, seconded by the Honourable Senator Hayden, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—
Resolved in the affirmative.

ROBERT FORTIER,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

WEDNESDAY, June 24, 1970.

(7)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:00 a.m.

Present: The Honourable Senators: Argue, Aseltine, Croll, Eudes, Ferguson, Gouin, Langlois, Méthot, Prowse, Smith and Urquhart—(11).

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; Mr. Pierre Godbout, Assistant Law Clerk and Parliamentary Counsel and Director of Committees.

In the absence of the Chairman and on Motion of the Honourable Senator Smith, the Honourable Senator Urquhart was elected Acting Chairman.

On Motion of the Honourable Senator Argue it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of Bill C-212, intituled: "An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act."

The following witnesses were heard:

Mr. D. A. Davidson, Acting Director, Territorial Relations Branch, Department of Indian Affairs and Northern Development;

Mr. G. B. Armstrong, Chief, Water Resources Section, Department of Indian Affairs and Northern Development.

After discussion and on Motion of the Honourable Senator Smith, it was Resolved to report the Bill without amendment.

At 10:45 a.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

REPORT OF THE COMMITTEE

Wednesday, June 24, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-212, intituled: "An Act to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act", has in obedience to the order of reference of June 23, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

EARL W. URQUHART, Q.C.
Acting Chairman.

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

EVIDENCE

Wednesday, June 24, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-212, to amend the Yukon Act, the Northwest Territories Act and the Territorial Lands Act, met this day at 10 a.m. to give consideration to the bill.

Senator Earl W. Urquhart (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, we have referred to us for consideration Bill C-212 which was introduced in the Senate last night by Senator Prowse. Senator Aseltine also spoke in the debate, and the bill was read the second time and referred to this committee. Bill C-212 was read the first time in the House of Commons on May 11, 1970, and I think it would be well for me to read the recommendation that is contained in it:

His Excellency the Governor General has recommended to the House of Commons the present measure to amend the Yukon Act and the Northwest Territories Act respecting the payment of indemnities and expenses to the members of the Council of the Yukon Territory and of the Northwest Territories; to broaden the powers of the Commissioners in Council respecting the administration of justice and respecting the establishment, maintenance and management of prisons; and to increase the size of the respective Councils and the number of members elected thereto;

Also to amend the Territorial Lands Act to give the Governor in Council the power to set apart and appropriate territorial lands as land management zones and to make regulations controlling the use of the surface of lands in such zones; and further to provide for certain changes in connection with the administration of the Act.

We have with us as witnesses this morning Mr. D. A. Davidson, the Acting Director of

the Territorial Relations Branch of the Department of Indian Affairs and Northern Development, and Mr. G. B. Armstrong, of the Water Resources Section of the same department. They are here to assist us in our discussion of this bill.

Are there any questions that honourable senators would like to direct to either of these two gentlemen?

Senator Smith: Mr. Chairman, I am wondering whether either of the witnesses would entertain the idea of making a short statement just to remind us of the principles of the bill.

Mr. D. A. Davidson, Acting Director, Territorial Relations Branch, Department of Indian Affairs and Northern Development: Thank you Mr. Chairman. I shall try to touch on the highlights of the bill.

As you know, the Territories, as regards their constitution, are different from the provinces in that they do not come under the British North America Act. Their constitution is contained in two acts of the Parliament of Canada—the Northwest Territories Act and the Yukon Act. In those acts the Minister of the Department of Indian Affairs and Northern Development is charged with their administration.

The basic element in the acts at this point, is that the councils—fully elected in the Yukon, and partially elected in the Northwest Territories—are legislative bodies. The executive authority in the Government of both Territories resides in the appointed commissioner, and the commissioner is appointed during pleasure by the Governor in Council. Under one act the council must meet once a year, and under the other act it must meet twice a year, but in practice they meet about three times a year and pass the legislation as presented by the administration.

There have been progressive moves, as you will see by looking at the office consolidations of these acts—they were amended in 1955,

1958, 1960, and 1966—towards expanding the executive, and taking it into the Territories. This is the process that has been going on, and difficult as it may be, this is the essential thing in that part of the bill that deals with these two acts.

To set the stage a little bit, I will say that the Yukon Territory has always had its commissioner and administration resident in Whitehorse. They have functioned there as a government in the Territory, and in eyes of the residents of the Territory this is a very important thing.

Up until 1967, the administration of the Northwest Territories was resident in Ottawa. The commissioner, up until 1963, was the Deputy Minister of our department, and then a separate commissioner was appointed, but the government administration in the Territories in respect of territorial ordinances, education, welfare, and so on, was performed by federal staff of the Department of Indian Affairs and Northern Development.

In the fall of 1967, after a building up period, the commissioner's staff in Ottawa was moved physically to Yellowknife. To do this we had to provide not only for the staff to go there, but for housing and all other physical accommodation on the ground. In April, 1969, we turned over the administration of the western part of the Territory, the Mackenzie District. We had to do this in a phased way in order to let the territorial government build up an administration that was able to take on this responsibility. In this process, we transferred our field staff to the territorial government, and we gave them our finances. In April, 1970 we turned over the balance of the Territories—the eastern Arctic, as we call it.

At the present point of time, the territorial administration in Yellowknife has control of all the services for all the people in the Territories, and this is the on-going form of administration for the Northwest Territories. Actually, it brings the Northwest Territories up to the point where the Yukon has been for some years, with a local administration providing all of the provincial-type services, with the exception of health services. Health services are provided by the Department of National Health and Welfare for the very good reason that it is difficult to get medical staff into those remote areas.

Referring to the present bill, what we are trying to do is to move a little further in the process of giving to the Territorial Government power to deal with those things that

they can now handle on a purely territorial basis. We are taking them out of the federal act and saying to them: "You will set the qualifications of voters. You will say when certain administrative things are to be done." This authority will go into territorial legislation. The Territorial Governments are now prepared to put forward ordinances that will provide the legislative base for the things that are being remand from these federal acts, and we hope this process will go on further in the future.

One other major change is that in the Northwest Territories we are proposing to enlarge the size of the council. At present it has 12 members, five appointed and seven elected. We are now going to 14 members, four appointed and 10 elected. As you know, the Carruthers Commission has a good deal to say about this. There is also provision in the bill, as it now stands, for further deletion of appointed members without coming back to the federal Parliament.

Then, of course, there are sections dealing with the administration of justice in both territories. In the absence of anyone from the Department of Justice, I will say just a word as I understand these sections.

Senator Prowse: You are among friends!

Mr. Davidson: In both territories, the Attorney General of the territories is the Attorney General of Canada. The policing in the territories is carried out by the R.C.M.P., and generally this is under a contractual arrangement. It is proposed in the bill to turn over to the territories responsibility for the administration of the courts, and what we commonly call the administration of justice, except the function of the Attorney General, relating mainly to criminal justice. I am sorry, I may not be entirely specific, but that is as I understand it. It is largely for constitutional reasons that they cannot go to the extent of turning over the Attorney General's function. As I understand it, it is considered that there must be an elected representative of the people responsible for this function, and at this point in time the only one available is the Minister of Justice. Short of that, the Territorial Governments will administer the courts and appoint sheriffs, justices of the peace and so on, which is now done at the federal level.

The third portion of the bill has to do with conservation of the northern environment. Mr. Armstrong is our conservation expert and perhaps he would deal with this aspect of the bill.

Mr. G. B. Armstrong, Chief Water Resources Section, Department of Indian Affairs and Northern Development: The sections of this bill dealing with the amendments to the Territorial Lands Act were developed in response to the problems that are beginning to emerge in the north with regard to increasing pace of development of resources and so on, and the dangers of serious ecological damage in that area as a result of resource exploration and development activities.

These amendments to the Territorial Lands Act provide for the designation of land management zones, which would be in areas of particularly sensitive environmental conditions—permafrost areas, areas that might, for instance, be the habitat of water fowl, the nesting grounds of water fowl and that sort of thing. They could also be in areas of particularly heavy or intense economic activity. The amendments also provide that the Governor in Council may make regulations respecting land use or exploration and development operations within these land management zones.

I think the general approach is that we would like to see development proceed in the north, but at the same time would like to afford some protection to the northern environment from needless damage or needless disturbance.

Senator Aseltine: There are the other two acts that were passed this session.

Mr. Armstrong: That is right.

Senator Aseltine: The idea is to have this bill and those two acts working together?

Mr. Armstrong: That is right. The three might be described as environmental management.

The Acting Chairman: Mr. Hopkins would like to ask a question at this stage.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: I was just wondering if the expropriation act is relevant to this taking of land in the Northwest Territories.

Mr. Armstrong: As far as these amendments are concerned, there is no question of expropriating land. In other words, a land management zone would not remove an area from any activity at all. It would simply mean that resource development activities that went on within the land management

zone would be subject to certain control or regulations, which would result hopefully in minimizing the damage to the environment.

Mr. Hopkins: The act does use the word "appropriate". In the new clause 3(a) it uses the words, "may set apart and appropriate". Perhaps it is not full appropriation within the ordinary meaning of the word.

Mr. Armstrong: No. I think what you could read there is "designated area".

Senator Smith: It is not taking it away from anybody.

Mr. Armstrong: No.

Mr. Hopkins: Would that not be expropriation, if you took it away from somebody?

Senator Smith: In this case it is appropriating a certain area of land for ecological purposes.

The Acting Chairman: You are setting it aside.

Mr. Hopkins: You are not necessarily taking it away.

Mr. Armstrong: This is not the intention at all. The Territorial Lands Act as it existed up to this time, before these amendments, provides authority for the minister to set aside or almost expropriate certain areas for game sanctuaries and that type of thing. This is not our approach here. What we want to do is to designate areas for management of land, and the management of the use of lands.

For instance, I can give an example that might clear the point up. In the tundra area, in the region of the Mackenzie delta, during the brief summer this tundra is particularly sensitive to any type of disturbance. It is a region of permafrost, and permafrost is in a balance there, at very short depths beneath the soil. It is kept that way by virtue of the fact that there is a moss and lichen cover on it. If this is removed, the permafrost recedes and there is what is known as thermal cast, or you can get thermal erosion; or if a tractor vehicle disturbs the surface down a long slope, the permafrost melts, the soil subsides and you have slumping, so that what started off as a track in the moss might end up, as we have seen in certain areas, as a gully 12 feet deep, perhaps 30 feet across, with water running down it, soil erosion and so on.

Senator Prowse: A new river!

Mr. Armstrong: Well, it is right along this line. With a regulation which would set out the type of vehicle that could operate on the tundra during certain seasons, which would minimize this disturbance to moss insulation, we think we can go a long way towards preventing this type of thing, while at the same time still permitting the exploration, development and exploitation of resources to take place.

Senator Aseltine: What are the dangerous periods to the permafrost?

Mr. Armstrong: The summer months, depending on the latitude operated at. In the Mackenzie delta from around the latter part of May and the first part of June until about October 1.

Senator Aseltine: That is the summer in the north.

Mr. Armstrong: That is right. At this point we do not intend to say that there be no activity whatsoever take place on the tundra during the summer months with land-based vehicles, because new developments are coming along all the time. Next week there is to be a program of testing a number of these vehicles with a group of scientists who will measure the vehicles—these are of a type that are useful to oil companies—to see what disturbances are involved and what kind of loading problems are involved in their use.

Senator Aseltine: Do you use hovercraft up there? That would solve it.

Mr. Armstrong: This would certainly solve it, all right. There has been some attempt to use hovercraft, but at this point they are not economic. If the oil companies were required to use, for example, nothing but hovercraft, their costs of exploration would probably go up about five times. They are very unreliable, they do not perform like some of the other vehicles.

Senator Aseltine: There has not been much disturbance of the permafrost up to date, has there?

Mr. Armstrong: No, I think this is right.

Senator Aseltine: You are taking precautions to protect it.

Mr. Armstrong: Yes.

Senator Prowse: You assume what could happen if it were not controlled?

Mr. Armstrong: Yes. The north slope of Alaska is probably one of the best examples of what could happen if it is not controlled. There was a lot of activity around Prudhoe Bay before it was fully realized what the implications are of disturbing that area.

Senator Aseltine: Have you been in that area?

Mr. Armstrong: Yes, I have been just into it. I have not really covered it thoroughly. However, we have been working very closely with the Alaska people and we have had a fair number of examples in our own north that we can look at and come up with some ideas on.

Senator Smith: Mr. Armstrong, what did happen in the Prudhoe Bay area that you started to tell us a little more about, due to the use of the kind of vehicles they were using there and its effect. What did happen there?

Mr. Armstrong: To put this in right perspective, if a company or industry is going into a new area about which very little is known and in which very little expertise or experience exists on how to operate, what usually happens is that you take a system you have used somewhere else, in northern Alberta or somewhere like that, and you move it north. Then you try to adapt it to make it work under different conditions, but this does not always work out properly. For instance, take the example of a seismic operation, which is usually the first thing that happens in an area when it is being explored for oil. A seismic operation in the south has involved sending out a "cat", a bulldozer, and making a trail, bulldozing down trees, removing the top soil and making a smooth trail that trucks, wheeled vehicles, can operate on. All the sensitive equipment, seismic equipment, that is used, recording equipment, the drilling equipment, the geophone equipment, is all truck mounted. This is what they did in the north. They went in there in the wintertime, because it is difficult to operate a truck in that area in the summertime. They bulldozed the surface, which is not smooth by any means, it is kind of hummocky. They bulldozed the surface down until they had a smooth trail and then operated the trucks on it.

In the spring of the year, the moss and the insulating layer had been all piled to one side and this perma erosion set in, and what was

just a relatively insignificant trail in the wintertime developed into a regular gully, an erosion channel.

Senator Aseltine: I understand that part of it all right. Why did this bill take so long in the House of Commons committee—six volumes of minutes, which I have not had time to read yet but which I would like to read some time in the future. What was the reason? Were there many objections and, if so, what were these objections. Why were so many amendments put forward? Could you give us some information with respect to those matters?

Senator Smith: Mr. Chairman, I wonder if it would not be improper to have a comment here on what went on in the House of Commons committee?

Mr. Davidson: My first remark was to be that I have nothing to say about what happened in the House of Commons with respect to this bill. I do know that there was a great deal of interest in it.

Senator Aseltine: I understand that, but I was wondering what the objections were to some of the sections of the new legislation.

Mr. Davidson: I would hesitate to go into any detail but in general, particularly on the Yukon side, there were many suggestions for further arrangements in the process which I described as taking authority out of the federal legislation and putting it into the territorial legislation.

Senator Aseltine: They wanted to suggest further amendments?

Mr. Davidson: Yes, in effect, that would be the case.

Senator Aseltine: An increase in the number of members of the council, for example and that kind of thing.

Mr. Davidson: That is right. This is the trend, on the executive side largely, taking it from the federal control, to the territorial control.

Senator Aseltine: The members of council are all elected?

Mr. Davidson: The members of the Yukon Council are all elected.

Senator Aseltine: And in the Northwest Territories they are not?

Mr. Davidson: At the present time five are appointed, one of whom is a deputy commissioner, and seven are elected. We are proposing here that we would reduce the appointed members to four and increase the elected to ten, which is a major change for the territories in terms of new electoral districts.

Senator Aseltine: Could you give us some information now as to the members of the council at the present time? Are Indians and Eskimos members?

Mr. Davidson: Yes, Mr. Chairman. At the present time the electoral districts in the Northwest Territories, which I assume you are referring to, are four constituencies in the west and three constituencies in what we call the Arctic, the Arctic being the Keewatin-Baffin areas and the islands in the north. That dividing line is very roughly the Manitoba-Saskatchewan border.

In the west, the four elected members are white residents. In the Arctic, there are two white residents and one Eskimo elected. Amongst the appointed members is one Indian chief, John Tetlich. The deputy commissioner, by virtue of the act, has to be a member of the council, and he is a white resident. The remaining three are appointed by virtue of what experience they would bring to the council from their own background. One is Air Marshall Hugh Campbell, a retired air staff officer who is well versed in corporate affairs. Another is a businessman from British Columbia, Mr. Gordon Gibson. The third is Dr. Lloyd Barber, who is now the commissioner dealing with Indian treaties.

At least, this is the premise on which, as I understand it, this has been carried on, to bring in these diverse attributes to the council, having then a mixture of both local and outside experience.

Mr. Carruthers dealt with this to some extent, and recommended that this be continued, and the council also favours this pattern.

Senator Aseltine: Did he make any recommendations as to the numbers?

Mr. Davidson: Yes, he recommended that there should be an increase in the numbers of councillors based on population growth. As far as I know we go along with this because we think it is the proper course. Of course, the rate of growth has not been all that great.

Senator Aseltine: Did he recommend more representation from the Eskimo people and from the Indian people? It does not seem to

me that having one Eskimo and one Indian would be enough when the territory is so large.

Mr. Davidson: No, there is no differentiation between electing on ethnic backgrounds. The effect of the amendment here to provide additional electoral districts will obviously provide greater opportunity, particularly now when there are going to be ten electoral districts and they are going to break down into smaller areas and some are going to be in almost purely Eskimo areas. It is a little less helpful in the Mackenzie. As you know, the Indians are all on the Mackenzie side and the Eskimo are on the Arctic coast and the eastern Arctic, and there will continue to be a mixture of Indian and Whites in the Mackenzie in every electoral district practically, but in the Arctic, some electoral districts will be almost 98 per cent Eskimo.

Senator Aseltine: In the Yukon, are there any members of the Council who are either Eskimo or Indian?

Mr. Davidson: No, there are no Indians or Eskimos elected.

Senator Aseltine: I was wondering if the effort to have the Council enlarged to 15 had not something to do with that.

Mr. Davidson: Well, I do not think there is a direct connection. Carruthers related representation to the number of residents—so many residents and so many representatives rather than a specific number. The number 15 which I referred to came up in a resolution of the Council.

Senator Prowse: One of your problems is that you have a population of over 16,000 in the Yukon and you have only 2,500 natives, whereas in the Northwest Territories you have a 50-50 balance.

Mr. Davidson: This is very true. The Indian population in the Yukon is a much smaller portion of the total population than in the Northwest Territories. There are really no Eskimos in the Yukon, although at this point of time with the increasing activity on the Arctic coast, a census at this time will throw up something like 10 or 12 or something like that. But in the Northwest Territories there are more Eskimos than Indians.

Senator Aseltine: Has there been any agitation in those territories to become part of the

provinces to the south? I know that a short time ago the Premier of British Columbia was quite anxious to annex most of the Yukon Territory and if Alberta did the same thing, and Saskatchewan and Manitoba, it would solve all these problems. They would simply take over these areas.

Mr. Davidson: Mr. Chairman, we can only refer to things we have seen in print and heard at Council sessions. Locally this is not a popular move at all because it means the end of the Yukon as a separate entity and also of the Northwest Territories.

Senator Prowse: That suggestion comes from provincial premiers who are not residents of the areas concerned.

The Chairman: Any further questions?

Senator Smith: I wonder, Mr. Chairman, whether Mr. Hopkins would have anything to say about the legal language covering the ideas that have been outlined.

The Law Clerk: I only have the one comment after reading the Act carefully. I think it is well drawn and I am satisfied with it.

Senator Aseltine: Do you think it is workable?

The Law Clerk: You should never ask a lawyer that type of question.

Senator Aseltine: I was hoping the Minister himself would be here today, but I think we should thank the representatives who have appeared and who have spoken to us.

The Chairman: I think Mr. Davidson and Mr. Armstrong did exceptionally well and they answered all our questions just as well as the minister would have done if he had been here. We are indebted to them for coming and informing us so well on the type of government that exists now in the Yukon and the Northwest Territories and for explaining the changes proposed in Bill C-212. Thank you, gentlemen, for the informative explanations you have given on the provisions of the bill.

Honourable senators, shall we report the bill without amendment?

Senator Smith: I so move.

Hon. Senators: Agreed.
The committee adjourned.

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